

Applicant Details

First Name **Yasmeen**
 Last Name **Metellus**
 Citizenship Status **U. S. Citizen**
 Email Address ym2134@nyu.edu
 Address

Address
Street
240 Mercer St
City
New York
State/Territory
New York
Zip
10012
Country
United States

Contact Phone Number **9546101426**

Applicant Education

BA/BS From **Columbia University**
 Date of BA/BS **May 2020**
 JD/LLB From **New York University School of Law**
<https://www.law.nyu.edu>
 Date of JD/LLB **May 17, 2024**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Review of Law and Social Change**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/Externships **No**
 Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Parker, Dennis
parker@nclej.org
212-633-6967

Sykes, Emerson
esykes@aclu.org

Sack, Emily
ejs2163@nyu.edu
401-254-4603

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Yasmeen Metellus
240 Mercer St
New York, NY, 10012
June 12th, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

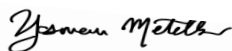
I am writing to apply for a clerkship in your chambers for the 2024 term and any subsequent terms. I am currently a rising third-year student at New York University School of Law, where I am a Birnbaum Women's Leadership Fellow and a Notes Editor for the *Review of Law and Social Change*.

I am interested in clerking in your chambers because the experience will enable me to develop the necessary tools to advocate for marginalized communities. I am the proud child of Haitian immigrants, raised in the melting pot of South Florida. Growing up, I witnessed firsthand the hardships my family faced when my father was diagnosed with leukemia. I watched my mother endure immense financial strain as she struggled to pay for my father's medical bills. Later, as the eldest daughter in a single parent household, I supported my family by working part time throughout Columbia while also juggling extracurriculars and a rigorous academic schedule. My personal experiences have motivated me to utilize the legal system as a tool for advocating on behalf of those most impacted by inequality.

Throughout my time at NYU Law, I have sought to engage my interests in advocacy through my involvement with the Gender Violence Advocacy Project, where I was given the opportunity to help low-income women gain orders of protection. As a 1L, I served part-time as a fellow for Ignite National, a nonprofit that empowers college women to engage in local politics. In addition, I continued to research issues of inequality as a research assistant with the Center for Community Power. I plan to continue my dedication to social advocacy as an incoming research assistant for Kenji Yoshino and the Center for Diversity and Belonging and as an incoming student attorney for the Critical Race Theory Clinic.

I believe that my academic, extracurricular and personal interests will allow me to contribute meaningfully to your chambers. Enclosed I have attached my resume, law school transcript, undergraduate transcript, and writing sample. NYU Law Professors Dennis D. Parker, Emily Sack and Emerson Sykes have submitted separate letters of recommendations on my behalf. This academic year I participated in their seminars and submitted substantive legal writing for their classes.

Respectfully,



Yasmeen Metellus

YASMEEN METELLUS

240 Mercer S Apt. 1108 New York, NY | (954) 610 - 1426 | ym2134@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY

Candidate for J.D., May 2024

Honors: *Review of Law and Social Change*, Notes Editor
 Birnbaum Women's Leadership Fellow—one of 12 selected from 81 applicants

Activities: Black Allied Law Students Association, Professional Development Chair
 Mock Trial, Competitor
 Teacher's Assistant for Lawyering/Legal Writing course (Fall 2022 and Spring 2023)
 Incoming Teacher's Assistant for Education Law (Fall 2023)
 Incoming Research Assistant for Professor Kenji Yoshino (Focused on education curricular bans)

COLUMBIA UNIVERSITY, New York, NY

B.A. in Political Science, May 2020

Honors: Dean's List (all semesters); Kings Crown Leadership Excellence Award; Ron Brown Scholar

Activities: Columbia University Black Pre-Professional Society, Founder

EXPERIENCE

DAVIS POLK, New York, NY

2L Diversity Summer Scholar, May 2023-July 2023

Working primarily in Civil Litigation and White-Collar practice areas. Researching posthumous pardons for pro bono team.

NYU CENTER FOR RACE INEQUALITY AND THE LAW, New York, NY

Research Assistant, January 2023-May 2023

Served as a research manager for a team of 8 undergraduate and masters students. Directed research relating to community power initiatives and movement lawyering. Organized meetings with activists and movement lawyers to present our findings.

LOWENSTEIN SANDLER, New York, NY

1L Diversity Summer Scholar, May 2022-July 2022

Selected as a 1L diversity scholarship recipient. Rotated through the litigation, corporate, and pro bono practice areas. Drafted memos for the litigation department. Collaborated with team members to complete a clemency application for pro bono clients. Completed research and conducted document review for pro bono resentencing cases.

IGNITE NATIONAL, New York, NY

Civic Engagement Fellow, September 2020-June 2022

Participated in a civic fellowship to empower women to run for public office. Worked part-time as a fellow throughout my first year of Accenture and first year of law school. Recruited and trained over 100 women from four university campuses across Miami and New York to join Ignite National. Collaborated with elected officials and community organizers to lobby and support legislation focused on voting rights. Hosted events with a fundraising team to attract new donations.

ACCENTURE, New York, NY

Strategy Analyst, September 2020-July 2021

Collaborated with the United Nations Global Compact to design a 6-month accelerator program for 100 + companies interested in integrating the UN's sustainable development goals into their core business practices.

Personal: daughter of Haitian immigrants, raised in Florida. Interests include kickboxing and coaching high school debate.

Name: Yasmeen Metellus
 Print Date: 06/05/2023
 Student ID: N14983889
 Institution ID: 002785
 Page: 1 of 1

**New York University
 Beginning of School of Law Record**

Fall 2021

School of Law Juris Doctor Major: Law				
Lawyering (Year)	LAW-LW 10687	2.5	CR	
Instructor: Brandon Jeromy Johnson				
Torts	LAW-LW 11275	4.0	B	
Instructor: Cynthia L Estlund				
Procedure	LAW-LW 11650	5.0	B	
Instructor: Jonah B Gelbach				
Contracts	LAW-LW 11672	4.0	B	
Instructor: Barry E Adler				
1L Reading Group	LAW-LW 12339	0.0	CR	
Instructor: Maggie Blackhawk				
	<u>AHRS</u>	<u>EHRS</u>		
Current	15.5	15.5		
Cumulative	15.5	15.5		

Spring 2022

School of Law Juris Doctor Major: Law				
Constitutional Law	LAW-LW 10598	4.0	B	
Instructor: Daryl J Levinson				
Lawyering (Year)	LAW-LW 10687	2.5	CR	
Instructor: Brandon Jeromy Johnson				
Legislation and the Regulatory State	LAW-LW 10925	4.0	B	
Instructor: Roderick M Hills				
Criminal Law	LAW-LW 11147	4.0	B+	
Instructor: Sheldon Andrew Evans				
1L Reading Group	LAW-LW 12339	0.0	CR	
Instructor: Catherine M Sharkey				
	<u>AHRS</u>	<u>EHRS</u>		
Current	14.5	14.5		
Cumulative	30.0	30.0		

Fall 2022

School of Law Juris Doctor Major: Law				
Education Law Seminar	LAW-LW 11448	3.0	A	
Instructor: Dennis David Parker				
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	B+	
Instructor: Stephen Gillers				
Evidence	LAW-LW 11607	4.0	B	
Instructor: Erin Murphy				
Teaching Assistant	LAW-LW 11608	1.0	CR	
Instructor: Brandon Jeromy Johnson				
Domestic Violence Law Seminar	LAW-LW 12718	2.0	A	
Instructor: Emily Joan Sack				
	<u>AHRS</u>	<u>EHRS</u>		
Current	12.0	12.0		
Cumulative	42.0	42.0		

Spring 2023

School of Law Juris Doctor Major: Law				
Contemporary Issues in Immigration Law and	LAW-LW 10020	3.0	A-	

Policy Seminar				
Instructor: Omar Cassim Jadwat				
Judy Rabinovitz				
Criminal Procedure: Post Conviction	LAW-LW 10104	4.0	B+	
Instructor: Emma M Kaufman				
Teaching Assistant	LAW-LW 11608	1.0	CR	
Instructor: Brandon Jeromy Johnson				
Property	LAW-LW 11783	4.0	B	
Instructor: Katrina M Wyman				
Race and the First Amendment Seminar	LAW-LW 12851	2.0	A	
Instructor: Emerson J Sykes				
	<u>AHRS</u>	<u>EHRS</u>		
Current	14.0	14.0		
Cumulative	56.0	56.0		
Staff Editor - Review of Law & Social Change 2022-2023				
End of School of Law Record				

**TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS**

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	All other JD and LLM (Non-Mandatory)
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	Maximum for A tier = 31%
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	Maximum grades above B = 57%
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

<i>Pomeroy Scholar:</i>	Top ten students in the class after two semesters
<i>Butler Scholar:</i>	Top ten students in the class after four semesters
<i>Florence Allen Scholar:</i>	Top 10% of the class after four semesters
<i>Robert McKay Scholar:</i>	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021



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Executive Director

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Community Churches

Alexandra Wald
Cohen & Gresser LLP

Vincent Warren
Center for Constitutional Rights

June 12, 2023

RE: Yasmeen Metellus, NYU Law '24

Your Honor:

I submit this recommendation in enthusiastic support of Ms. Metellus' application for a judicial clerkship. In addition to my full-time employment as the Executive Director of the National Center for Law and Economic Justice, I have the pleasure of serving as an adjunct professor at NYU Law School where I had the pleasure of teaching a fall seminar in Education Law and Policy in which Ms. Metellus was a student. Based upon her work in that class, I recommend her to you without reservation.

I found Ms. Metellus to be a fully engaged student who was well prepared for class discussions and a very active participant in those discussions. She drew upon her personal experiences when discussing the impact of the complicated legal decisions relating to education and demonstrated a firm grasp of the complexity of the related law. I was particularly impressed by her enthusiasm for exploring difficult issues in education law. The final paper in the course was on a subject of the student's choosing. In preparation for that paper, she scheduled a meeting with me in which she suggested several potential paper topics in which she was interested. Her ultimate choice of paper topic was on a subject with which I was not familiar, the impact of college withdrawal and reinstatement policies on students experiencing mental health problems including suicidal ideation. The paper explored numerous issues involving liability of institutions of higher learning under tort and disability law. It then suggested recommendations to protect the interest of the schools and the students. I thought it illustrated Ms. Metellus' skills at legal analysis as well as her writing skills.

I found Ms. Metellus to be such a positive addition to the class that I was extremely pleased when she accepted my offer to return as a Teaching Assistant this fall. I believe that her knowledge of education law as well as her personal skills will be invaluable in the class. I believe those skills would also serve her well as a judicial clerk. Putting on my executive director hat, I know that I would be pleased to have an attorney like her work for my organization.

Please let me know if I can provide any further information.

Best regards,

Dennis D. Parker



EMERSON J. SYKES
Adjunct Professor of Law
Senior Staff Attorney, American Civil
Liberties Union

NYU School of Law
 40 Washington Square South
 New York, NY 10012
P: 212 998 6100
M: 650 804 0234
 ejs428@nyu.edu

June 12, 2023

RE: Yasmeen Metellus, NYU Law '24

Your Honor:

I am writing to enthusiastically recommend Yasmeen Metellus, a rising 3L at NYU School of Law, for a clerkship in your chambers. Yasmeen was an exceptional student in a seminar I taught this semester, Race and the First Amendment. I was deeply impressed by her intellectual acuity, diligence, and interpersonal grace. I have no doubt that she will contribute immensely in any professional setting.

The Race and the First Amendment Seminar was largely discussion-based and of the nineteen students, no one more consistently contributed insightful questions and comments to the discussion. Throughout the semester, and in particular during a simulation exercise near the end of the term, she was able to make creative connections between key themes in the course material, displaying a nuanced appreciation for underlying principles and norms. At the same time, she displayed the ability to thoughtfully reason through complicated fact patterns and she was able to clearly articulate multiple considerations that informed her thinking. While displaying her mastery of the course material, she often drew on experiences outside of class, either personal or professional, to provide examples to support her points. Yasmeen also asked probing questions of me and her classmates when topics were unclear or seemed unjust, a testament to both her bravery and willingness to be vulnerable intellectually.

Yasmeen wrote her final paper in the style of an amicus brief on behalf of Miami Dream Defenders in *Falls v. DeSantis*, a case that was pending in the Northern District of Florida challenging the Stop W.O.K.E. Act in K-12 public schools and universities. Students had the option of writing a comment-style paper or an amicus brief in a pending case and Yasmeen chose the latter. Early in the semester, she identified the issue she wanted to address – bans on inclusive education in Florida. She then identified a case that would be a viable vehicle for the issue she wanted to address and decided on an amicus client that would most compellingly convey her perspective. The idea for the paper was sound and the execution was exemplary. Yasmeen's brief was among the strongest in the class, balancing information with argumentation, all in an appropriately authoritative tone. She was able to write a convincing amicus brief without extensive previous experience with this type of writing. It bodes well for her ability to learn new styles of legal writing throughout her career.

Yasmeen frequently attended office hours to discuss the week's reading, talk through her final paper idea, or ask career-related questions. She was always well prepared with

Yasmeen Metellus, NYU Law '24
June 12, 2023
Page 2

thoughtful questions and consistently asked follow-up questions that displayed her strong legal analysis skills as well as her curiosity and thirst for knowledge. Yasmeen never boasted about her many accomplishments and leadership roles during the seminar, but I have come to learn that her eagerness to engage in office hours is indicative of her inclination to seize opportunities for growth and learning. Through her myriad extracurricular endeavors and personal commitments, Yasmeen has contributed immensely to the NYU Law community and the many other communities she holds dear. With her combination of intelligence, passion for justice, and professionalism, she is well equipped to achieve all of her ambitious goals.

I have no doubt that Yasmeen will be an excellent clerk. She takes joy and pride in working through complicated legal and factual issues, so it is easy to imagine her thriving in a clerkship. She quickly grasps new ideas and integrates them with what she already knows about the law and the world, another important trait for a clerk. All the while, Yasmeen displays a communitarian approach that will make her a principled advocate and a pleasure to work with. I am proud to recommend such an exceptional student and impressive young person.

Sincerely,



Emerson J. Sykes
Adjunct Professor of Law, NYU Law
Senior Staff Attorney, ACLU



EMILY J. SACK
Adjunct Professor of Law
Professor of Law, Roger Williams
University School of Law

NYU School of Law
 40 Washington Square South
 New York, NY 10012
P: 401 254 4603
 ejs2163@nyu.edu

June 12, 2023

RE: Yasmeen Metellus, NYU Law '24

Your Honor:

I am writing to give my highest recommendation for Yasmeen Metellus, who is applying for a clerkship position in your chambers. Yasmeen has exceptional research, writing and critical thinking skills, and she also possesses a strong drive and commitment to excellence. As detailed below, I believe Yasmeen will make an outstanding judicial clerk.

I got to know Yasmeen well as a student in my Domestic Violence Law seminar at NYU Law School this past fall. I am a tenured full professor at Roger Williams University School of Law, and also serve as an adjunct professor of law at NYU. For the seminar, students were required to write a lengthy paper with original research and make a presentation on their topic which was designed to elicit class discussion. Yasmeen chose to write on the challenging topic of nonconsensual condom removal (known as “stealthing”), with a particular focus on the prevalence of this practice on college campuses. This is a very recently identified legal issue, with little existing case law or legal commentary. I met with Yasmeen several times to discuss and review her work, and I was struck by her commitment to determining the best way to conceptualize the harm caused by stealthing, and to achieve legal recourse for victims. Because stealthing doesn’t quite “fit” into existing categories in tort or criminal law, this was a complex task.

In the paper, Yasmeen did a masterful job in exploring the harms to victims of stealthing and concluding that it is best conceived of as a form of sexual violence, reproductive coercion, and intimate partner violence. She then examined potential civil and criminal remedies for this conduct. In particular, she recognized that the current legal understanding of lack of consent in both criminal and tort law regarding sexual assault might not be inclusive of victims who initially agree to sex with a condom, only to find that the primary condition (condom usage) of their consent has been removed. Because the UK and other countries have been leaders in legal recognition of the harm caused by this conduct, she examined international legislation and case law. Ultimately, Yasmeen proposed adoption of a conditional consent standard in both civil and criminal law that would capture the harms caused by stealthing. She also proposed amendments to Title IX to provide remedies for stealthing victims on college campuses. She thoroughly discussed both the benefits and potential harms of these various remedies and her proposals were both detailed and nuanced. This was truly innovative and original work.

Yasmeen also made an excellent presentation to the class, which ignited a very engaged class discussion and demonstrated real skill in making a topic come alive to other students.

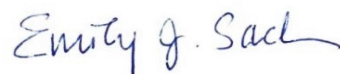
Yasmeen Metellus, NYU Law '24
June 12, 2023
Page 2

Beyond this presentation, she was a regular contributor to class discussion, where she consistently made thoughtful and intelligent comments. Not surprisingly, she received an A in the class, based on both her paper and her in-class performance.

Beyond her top-notch academic skills there are some common themes throughout Yasmeen's many activities and accomplishments: leadership, initiative, mentorship, and dedication to public service. To give just a few examples, while an undergraduate at Columbia, she started and led a Black Pre-Professional Society to provide Black students with support to secure internship opportunities and full-time jobs. She organized workshops, organized a speaker series, and invited recruiters to meet with the Society members, taking the organization from a small start-up to a Society with more than 600 members. At NYU Law School, she holds leadership positions in both the Black Allied Law Students Association and the Women of Color Collective. Yasmeen is President of the High School Leadership Institute, where she teaches debating skills to NYC high school students. Before and during Law School, she worked with Ignite International, which encourages young women to run for political office and become involved in legislative advocacy. She worked with over 100 young college women and has told me how much she has enjoyed teaching and working with students. Yasmeen was also selected to serve as a Birnbaum Women's Leadership Fellow and served as a teaching assistant for NYU's Lawyering/Legal Writing class this past year. Next year she will be a teaching assistant for the Education Law class. She also holds the position of Senior Staff Editor on NYU's Review of Law and Social Change and is a member of the mock trial team.

Though I have taught many highly talented students, Yasmeen stands out as someone with not only excellent academic skills, but also a dedication to working in underserved communities and mentoring young people, with the organizational and leadership skills to achieve her goals. This is a rare combination of qualities that will make Yasmeen an excellent judicial clerk, attorney, and advocate. Yasmeen is a highly mature, likeable, energetic, and professional young woman who is engaged with the world and would integrate well into your chambers. She is truly a superlative candidate, and I hope that you will give her your closest consideration. I would be happy to provide any further information that would be helpful to you, and I can be reached at 401-254-4603 or ejs2163@nyu.edu. Thank you very much for your attention.

Sincerely,



Emily J. Sack
Adjunct Professor of Law
NYU School of Law
Professor of Law
Roger Williams University School of Law

YASMEEN METELLUS

240 Mercer S Apt. 1108 New York, NY | (954) 610 - 1426 | ym2134@nyu.edu

Cover Page:

This paper was written for my Race and First Amendment seminar in Spring 2023, taught by Professor Emerson Sykes. For this course, my professor instructed me to write a mock amicus brief from the viewpoint of the ACLU. My amicus brief was written in response to the *Falls v. DeSantis* case in the United States District Court, Northern District of Florida. For this amicus brief, I was tasked with arguing why Florida's Stop W.O.K.E Act violates the First Amendment. For brevity's sake, I have omitted some of the formatting, including the table of contents and table of authorities.

This is the unedited version of my paper, and it has not received additional corrections or feedback from my professor. I am the sole author of this academic work.

STATEMENT OF ISSUE

This case is about whether the State has the power to silence the voices of educators and suppress information that students are exposed to in their classrooms by banning entire subjects from the curriculum deemed to be offensive by the government. The policy at issue is the Stop Wrongs Against Our Kids and Employees Act.

FACTUAL BACKGROUND

On April 22, 2022, Florida Governor Ron DeSantis signed into law a ban on Critical Race Theory, known as the Stop Wrongs Against Our Kids and Employees Act (Stop W.O.K.E. Act) or Individual Freedom Act (the "Act"). According to the Florida Senate's Education Committee, the law was "designed to protect individual freedoms and prevent discrimination in the workplace and public schools" by enacting a prohibition on "subjecting" individuals to required training or instruction for topics such as bearing "personal responsibility" or feeling guilt for historic wrongdoings because of their race, gender, or national origin.¹

The IFA amends Florida Statutes that govern required instruction in K-12 public schools to mandate not just what topics K-12 public schools should include in their curricula, but how those topics must be taught. The Act's purpose is to create a "Woke-Free" Florida by singling out and eradicating discussion about topics such as Critical Race Theory. The IFA addresses Governor DeSantis's crusade against "wokeness" by forcing teachers to discuss material that

¹ Fla. S. Comm. on Education, SB 2809, 2022 Leg., Reg. Sess. (Fla. 2022), <https://www.flsenate.gov/Committees/BillSummaries/2022/html/2809>.

supports the six "principles of individual freedom" expressed in the bill in a manner that agrees with those principles or takes a neutral position. *See* §1003.42(3), Fla. Stat. (2022).

The act also forbids teachers from indoctrinating or persuading students to a particular view “inconsistent with the principles of this subsection or state academic standards.” *See* §1003.42(3), Fla. Stat. (2022).

SUMMARY OF ARGUMENT

As a constitutional matter, this case falls squarely within the line of cases beginning with *Tinker v. Des Moines Independent Community School District and Board of Education, Island Trees Union Free School District v. Pico*. In *Tinker*, the Court held that public school students did not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” 393 U.S. 503, 506. These cases began to illustrate a right to freedom of speech and a right to access information. Then, in *Hazelwood School District v. Kuhlmeier*, the Supreme Court established the “Hazelwood test”, requiring that a school's restriction on student access to information must be reasonably related to a “legitimate pedagogical concern.” 484 U.S. 260, 262. Schools may regulate access to information if they can show that it would significantly interfere with the educational environment or the rights of others.

In this case, the government has not shown a legitimate pedagogical to support the Stop W.O.K.E Act. This policy seeks to transform schools into “enclaves of totalitarianism” *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507 (1969). The law purports to prioritize promoting civility and order within school settings, but this is a facade to conceal its underlying political objective of censoring or eradicating discourse and ideas

considered progressive or left leaning. For example, Governor DeSantis has publicly stated that he signed the bill to prevent the “far left woke agenda from taking over schools.”²

There is also a long history of courts denying schools the right to prescribe what “shall be orthodox in politics, nationalism, or religion.” *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). The law violates this longstanding rule by vowing to protect children from feelings of “guilt or shame” about the country’s history and instill in students a sense of patriotism.³ The court in *West Virginia State Board of Education v. Barnette* previously held that while schools have a legitimate interest in promoting patriotism and national unity, this interest can not override the students' right to freedom of speech and conscience. 319 U.S. 624, 642 (1943). In addition, claims that classroom conversations about race are uncomfortable and thus inappropriate for students ignore an emerging body of research that shows that culturally relevant pedagogy benefits white students and students of color.⁴

The Stop W.O.K.E Act carries severe consequences for high school students, particularly those of color, as attested by the words of those who may be directly affected. Cyara Pestaina, an 18-year-old student at Miami Dade County High School, has voiced concern that the legislation would deprive students of opportunities to delve into the role of African history in the United States, stating, “We don’t get a lot of chances to look into how African history plays into this country [and] we talked about serious topics that are hard to talk about.”⁵ Meanwhile, Elijah

² Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination, (2022), <https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/>.

³ Matt Papaycik, Florida’s Governor Signs Controversial Bill Banning Critical Race Theory in Schools, WPTV, Apr. 22, 2022, <https://www.wptv.com/news/education/floridas-governor-to-sign-critical-race-theory-education-bill-into-law>.

⁴ School Curricula and Silenced Speech: A Constitutional Challenge to Critical Race Theory Bans, 107 Minn. L. Rev. 1311, 1362.

⁵ Vassolo, Martin, Miami students speak out after African American studies course canceled, Axios, Feb. 1, 2023, <https://www.axios.com/local/miami/2023/02/01/florida-ap-african-american-studies-course-miami>.

Andrews expressed regret that the proposed act could undermine his sense of cultural pride by censoring the history that is integral to his cultural identity. He explains, "You can't ask the right questions if you are not educated on anything."⁶ Their statements illustrate the negative impacts of the Stop W.O.K.E Act on students' ability to engage in critical conversations about Black history.

Research shows that courses that included the history of marginalized peoples in a critical manner led to improved student outcomes and fostered feelings of belonging and inclusion among students of color.⁷ Thus, it is essential to engage in evidence-based practices that reduce bias and promote positive student identities and a strong sense of belonging. The Stop W.O.K.E Act chills these discussions by prohibiting teachings and statements such as: "Black Americans have one-tenth of the wealth of white Americans on average" and "Black men receive harsher sentences for the same crimes as white men."⁸ Eliminating these accurate statements prevents students from critically analyzing the world around them, hindering their growth and understanding.

The Stop W.O.K.E Act imposes unlawful restrictions on the First Amendment rights of students and creates a culture of censorship and oppression in the classroom that obstructs a student's right to access information. If this court holds that the Plaintiffs do have standing, an appropriate analysis of the merits must include consideration of the student's right to access information and the state of Florida's lack of pedagogical purpose for enacting the Stop W.O.K.E Act.

⁶ Vice News, This Student is Ready to Sue DeSantis Over Black History, YouTube (Mar. 29, 2022), [1:45], <https://youtu.be/SCK186II4wA>.

⁷ *Supra* Note 4

⁸ *Specifications for the 2022-2023 Florida Instructional Materials Adoption, K-12 Social Studies*.

I. K-12 students have the right to access information.

High schools should be places of education - not indoctrination. And education is “necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.” *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). It is also well established that “the Constitution protects the right to receive information and ideas.” *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). And students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507 (1969). The right to receive information is “an inherent corollary of the rights for free speech and press that are explicitly guaranteed by the Constitution.” *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982); *see also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”). The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive or consider them.” *Id.* (quoting *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965)).

This right extends to also include exposure to controversial ideas, particularly in the context of the “development of a school curriculum.” *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027. *Monteiro* also emphasizes that schools should not limit access to materials that impose upon students “a political orthodoxy.” 158 F.3d 1022 (9th Cir. 1998). By preventing the discussion of a supposed controversial topic like critical race theory in class, the government is “contract[ing] the spectrum of available knowledge” that students are exposed to. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). Therefore, a ban that restricts what can be discussed in a curriculum can be understood as an infringement on a student’s right to receive information.

Courts have been hesitant to contract the spectrum of available knowledge due to concerns about restrictions on the quality of education received by students. In *Pico*, the court recognized that without the right to receive ideas, there would be no way for students to meaningfully exercise their own "rights of speech, press, and political freedom." 457 U.S. 853, 867 (1982). Furthermore, in *Keyishian v. Bd. of Regents*, the court articulated that 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' 385 U.S. 589, 603 (1967) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). The court asserted that the classroom is the "marketplace of ideas" and that our country's future depends on students "trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritarian selection.'" *Keyshian*, 385 U.S. at 603. The Stop W.O.K.E Act seeks to contract this exchange of ideas by prohibiting instruction that suggests that individuals "bear responsibility for and must feel guilt, anguish or other forms of psychological distress." ⁹ Governor DeSantis' quest to outlaw speech deemed to make individuals feel discomfort runs contrary to the idea that students need to discover truth through a "multitude of tongues." 385 U.S. at 603.

II. Under Hazelwood, the State Requires a Legitimate Pedagogical Purpose to Restrict Students' First Amendment Right to Receive Information

While students have the right to receive information, schools are allowed to restrict this access to information "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262. The *Hazelwood* standard is

⁹ House of Representatives Staff, H.B. 7, 2022 Reg. Sess. (Fla. 2022), <https://www.myfloridahouse.gov/Sections/Documents/loadaddoc.aspx?FileName=h0007z1.JDC.DOCX&DocumentType=Analysis&BillNumber=0007&Session=2022>.

appropriate in this case because the Stop W.O.K.E Act impacts the school curriculum. *See Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 628-29 (2d Cir. 2005) (explaining that a class assignment is governed by *Hazelwood* because the assignment is incorporated into the curriculum); *Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1214 (11th Cir. 2004) (stating that *Hazelwood* "controls school-sponsored expression that occurs in the context of a curricular activity"); *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 924 (10th Cir. 2002) (discussing how the district court applied *Hazelwood* "to activities conducted as part of the school curriculum."). The 11th Circuit also has a history of adopting the *Hazelwood* standard as its chosen test for school speech. For example, in *Virgil v. Sch. Bd. of Columbia Cnty., Fla.*, the Eleventh Circuit rejected the proposition that school officials have an unrestricted right to remove a textbook from their curriculum. 862 F.2d 1517, 1522-23 (11th Cir. 1989).

Courts have also previously held that "school-sponsored speech" includes substantive classroom discussions. *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) ("[A] school committee may regulate a teacher's classroom speech if ... the regulation is reasonably related to a legitimate pedagogical concern"). Courts have also applied the *Hazelwood* standard to instructive materials shown to students. *See Virgil.*, 862 F.2d at 1521-23. Given that the Stop W.O.K.E Act creates restrictions for K-12 classroom curriculum and supporting materials through its six "principles of individual freedom", courts should apply the *Hazelwood* test to this analysis. The Stop W.O.K.E Act does not serve a legitimate pedagogical purpose, and thus as per *Hazelwood*, should be deemed to violate students' First Amendment rights. *See generally Hazelwood Sch. Dist.*, 484 U.S. 260.

The State argues that its action was created to address "woke indoctrination" and boost civility, but this is merely a pretext, and if a state articulates a seemingly legitimate interest, a

plaintiff may establish a First Amendment violation by proving that the reasons offered by the state mask other illicit motivations. *See Pico*, 457 U.S. at 85.

This upcoming section will go through the justifications of the Act proffered by DeSantis and legislators and argue why each goal violates the *Hazelwood* test.¹⁰ DeSantis' rationale is meant to mask his true goal of penalizing progressive viewpoints and targeting black studies.

A. No legitimate pedagogical interest is served by forcing students to agree with a particular political viewpoint, or by punishing those who refuse.

While the Board of Education contends that this Act is meant to prevent indoctrination, this is merely a pretext for punishing the progressive/liberal viewpoint. The text of the bill prohibits "social-emotional learning."¹¹ This phrase is used to mask the government's purpose of eliminating progressive viewpoints. Secretary of Education Corcoran, previously told a crowd at Hillsdale College that Florida rewrote its standards because book publishers are "infested with liberals" and because books contain "crazy liberal stuff" that is hidden under "social emotional learning."¹² Governor DeSantis later explained that he signed the bill to prevent "the far left woke agenda" from "taking over our schools and workplaces."¹³

The usage of the word "woke" in the Act's name also has a hidden pretextual motive. The word "woke" is used as a replacement for liberal. For example, Governor DeSantis' team was

¹⁰Thus far, courts have articulated a variety of reasons that meet the legitimate pedagogical goal requirement. In *Tinker*, the court found that public school administrators "retain some authority to restrict expressive activities that materially disrupt the educational mission of the school." 393 U.S. 503 at 513. They have also found that preventing the promotion of violation of the law, such as drug use is a legitimate goal. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

¹¹ *Specifications for the 2022-2023 Florida Instructional Materials Adoption, K-12 Social Studies*, <https://www.fldoe.org/core/fileparse.php/5574/urlt/SocialStudies-IM-Spec.pdf>

¹² Hillsdale College, *Education is Freedom: Featuring Commissioner Richard Corcoran*, at 33:30-39:24, Hillsdale College (May 14, 2021), <https://www.youtube.com/watch?v=HVujpIator0>.

¹³ Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination, (2022), <https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/>.

asked to clarify the definition of “woke” or “woke indoctrination.” DeSantis’ Communications Director defined “woke” as a “slang term for activism ... progressive activism” and a general belief in systemic injustices in the country.¹⁴ These examples illustrate a concerted effort by the Governor and his team to ban progressive viewpoints under the guise of decreasing indoctrination.

By targeting the progressive viewpoint, this Act violates the *Hazelwood* test and standards outlined in *Pico*. See generally *Hazelwood Sch. Dist.*, 484 U.S. 260; see also *Pico*, 457 U.S. 853. The facts of this case are like the facts in *Arce v. Douglas*. In *Arce*, the Ninth Circuit held that state officials needed a legitimate pedagogical interest to justify removing materials from classrooms. 793 F.3d 968, 983 (9th Cir. 2015). On remand, the court held that these curricular bans were based on partisan motives and thus unconstitutional. *Gonzalez v. Douglas*, 269 F. Supp. 948, 972-74 (D. Ariz. 2017). The court reasoned that by limiting the school curriculum in a partisan manner, schools are potentially restricting a “student’s ability to develop the individualized insight and experience needed to meaningfully exercise her rights of speech, press, and political freedom.” *Id.* (citing *Pico*, 457 U.S. at 867). In this instant case, the Act’s ban on “woke indoctrination” and liberal viewpoints should be considered a “partisan motive” and therefore an illegitimate pedagogical purpose. See generally *Gonzalez*, 269 F. Supp. 948.

B. The history of the STOP W.O.K.E Act suggests that it was motivated by racial animus.

The history and context of the Act reveal that its enactment was fueled by racial animus. In his legislative announcement, DeSantis argues that the Act is meant to “take a stand against

¹⁴ Miami Herald Editorial Board, What Ron DeSantis’ War on Woke Really Means, Miami Herald (Dec. 7, 2022), <https://www.miamiherald.com/opinion/editorials/article269675311.html>.

state-sanctioned racism".¹⁵ This is a pretextual motive; the language and history of the Act suggest that its passing was motivated by racial animus. Under *Pico*, the court found that the student's constitutional rights would be violated if a school board, "motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration." *Pico*, 457 U.S.at 871. The Stop W.O.K.E Act seems to follow the same actions prohibited in *Pico* by targeting books written by black authors and books advocating for racial equality. Once again, this goes against the precedent outlined in *Pico*. Last May, the Department of Education for the state, released a 6,000-page report reviewing books used in Florida curriculums. The report noted instances where books were rejected for mentioning "racial profiling in policing" and "types of housing for different groups of people."¹⁶ DeSantis and the Florida Department of Education deemed that this form of content was an attempt to indoctrinate students. The Department's media training also recommends that districts remove divisive content such as social justice theory. These restrictions have led to many school districts flagging books and learning materials as potential violations of the Stop W.O.K.E Act.¹⁷ One book publisher mentioned creating multiple versions of social studies materials by softening or eliminating references to race.¹⁸ Other sources have pointed out that compliance with the act has caused concerns over the "outsized attention" to slavery and "the negative treatment of Native Americans" in some textbooks. As a result, many textbooks with "outsized" attention to these

¹⁵ Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations, FLORIDA OFFICE OF THE GOVERNOR (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/>.

¹⁶ Andrew Atterbury, Mystery solved? Florida reveals why it rejected math books over critical race theory, Politico (May 5, 2022), <https://www.politico.com/news/2022/05/05/fldoe-releases-math-textbook-reviews-00030503>.

¹⁷ *Id.*

¹⁸ Mervosh, Sarah. "Florida Scoured Math Textbooks for 'Prohibited Topics.' Next Up: Social Studies." The New York Times, March 16, 2023, <https://www.nytimes.com/2023/03/16/us/florida-textbooks-african-american-history.html>.

topics are under review.¹⁹ These examples demonstrate that the Act seems to target diverse literature and “books advocating for racial justice”.

Although the Department of Education would proffer that the Act explicitly bans the teaching of classic racism, i.e., that “one race is superior to another race”, the act functionally bans the teaching of the history of racism and experiences of Black Americans. Just as the *Pico* case did not allow for the elimination of the book “Black Boy” from the curriculum, books related to racial injustice and social justice should not be eliminated under the guise of preventing indoctrination. 457 U.S.at 871.

It could be argued that this case is like *Bethel Sch. Dist. v. Fraser*, where the court found that a student’s freedom to “advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.” 478 U.S. 675, 681 (1986). The government could argue that the Stop W.O.K.E Act is justified by its legitimate interest in teaching “fundamental values of civilized society,” including “the essential lessons of civility.” 478 U.S. 675, 685-86. However, this case is distinguishable from *Bethel*. Firstly, the true intent of this Act is to target Black voices in literature and history, not to teach “lesson of civility.” And, even if civility is the goal of the legislation, courts evaluate First Amendment restrictions using a balancing test. Schools have a legitimate interest in maintaining order and discipline, but this interest “must be balanced against the student's First Amendment rights.” *Tinker*, 393 U.S. 503, 513-14. This implies that legislators cannot argue that teaching civility negates a student’s free speech right in its entirety.

¹⁹ *Id.*

Furthermore, courts have historically considered the reasonability of a stated pedagogical goal when analyzing if it meets the *Hazelwood* standard. In *Morse v. Frederick*, the Supreme Court held that schools may prohibit speech that is reasonably viewed as promoting illegal drug use. *Morse v. Frederick*, 551 U.S. 393, 422 (2007). The court stated that "the question is not simply whether the message can be characterized as advocating a particular viewpoint, but whether the message is one that reasonable observers would interpret as advocating illegal drug use." *Id.* The Supreme Court articulated that an interpretation is reasonable based on the totality of the circumstances, including the content of the speech, the context in which the speech occurred, and how the speech would be understood by the intended audience. *See* 551 U.S. at 402. It is difficult to see how social justice teachings would reasonably be perceived to be advocating for racism. For example, according to the Florida Department of Education's material adoption worksheet, the Stop W.O.K.E Act prohibits social justice concepts such as:

Seeking to eliminate undeserved disadvantages for selected groups.
Undeserved disadvantages are from the mere chance of birth and are factors beyond anyone's control, thereby landing different groups in different conditions. Equality of treatment under the law is not a sufficient condition to achieve justice.²⁰

While proponents of the ban may argue that these banned social justice concepts promote division and resentment between races, a reasonable observer would not interpret these statements as advocating for racism or discrimination. Social justice and racial studies aim to

²⁰ *Specifications for the 2022-2023 Florida Instructional Materials Adoption, K-12 Social Studies*, <https://www.fldoe.org/core/fileparse.php/5574/urlt/SocialStudies-IM-Spec.pdf>

address and eliminate systemic racism by acknowledging and examining its historical and present-day effects.²¹

In addition, the prohibited language discussed in the materials adoption sheet shares factual similarities to the banned program in the *Gonzalez v. Arizona* case. In that case, the court noted that the superintendents had "no legitimate basis for believing that the MAS program was promoting racism." 485 F. Supp. 3d 980, 1010 (D. Ariz. 2020). To determine whether the district had a "legitimate basis", the court looked at the district's stated reasons for the removal, which included claims that the program was promoting racial resentment. *Id.* The court found that the district's reasons were not supported by any evidence and were based on a "misguided perception" of the MAS program. *Id.* The court also noted that the district had not conducted any formal evaluation of the program or sought input from qualified experts in the field before deciding to remove it. *Id.* Similarly, a ban on critical race theory and social justice concepts assumes that its objectives are to promote a divisive and harmful ideology without a full understanding of what these theories entail.²² Without a legitimate basis for this assumption²³, the ban on critical race theory is similarly a violation of students' First Amendment rights since it is based on a misguided perception of the program's content and objectives.

²¹ Aspen Institute. "Honoring America's Racial and Ethnic Diversity in Education."

https://www.aspeninstitute.org/wp-content/uploads/2021/10/Aspen-Institute_UnitedWeLearn.pdf.

²² In fact, many have asserted that the crux of this ban is based on the writing and teaching of one person, Christopher Rufo. See Wallace Benjamin, How a Conservative Activist Invented the Conflict Over Critical Race Theory, New Yorker, June 18, 2021, <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory>

²³ The State's fear of critical race theory is based on a misperception of critical race theory. Critical race theory is not a single ideology. It was developed by a variety of academics that sought to expand their graduate curriculums and explore interactions between racial hierarchies and the law. Through the passage of the STOP W.O.K.E. Act, DeSantis is operating under false assumptions about the origins and teaching of critical race theory. He is conflating the theory with social justice and discussions about race when there is no one cohesive definition of Critical Race Theory. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

C. Patriotism is not a legitimate pedagogical goal.

The government also asserted that the ban on woke indoctrination was necessary to foster a sense of national unity. DeSantis' legislative announcement clearly articulates that the state intends to compel a sense of patriotism from its students; he states, “we won’t allow Florida tax dollars to be spent teaching kids to hate our country or to hate each other.”²⁴ He further went on to state:

“As the Governor of Florida, I love this state, and I love my country. I find it unthinkable that there are other people in positions of leadership in the federal government who believe that we should teach kids to hate our country. We will not stand for it here in Florida.”²⁵

Although critically examining the history of racism in America might dampen students' patriotism, students' First Amendment rights cannot be infringed in the name of "national unity" or "patriotism." *Barnette*, 319 U.S. at 642. The court in *Barnette* held that a forced pledge of allegiance was not just a tool to shape learning, but the goal was to compel patriotism. The Supreme Court held that the state cannot compel an “attitude of mind”, and additionally, the Court recognized that while schools have an interest in promoting national unity, this interest cannot “override the students' right to freedom of speech and conscience.” 319 U.S. 624, 642-43 (1943). Thus, patriotism is not a legitimate pedagogical goal that can be enforced. *See Id.* at 633.

²⁴Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations, FLORIDA OFFICE OF THE GOVERNOR (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/>.

²⁵ Governor DeSantis Emphasizes Importance of Keeping Critical Race Theory Out of Schools at State Board of Education Meeting, <https://www.flgov.com/2021/06/10/governor-desantis-emphasizes-importance-of-keeping-critical-race-theory-out-of-schools-at-state-board-of-education-meeting/>

Even if this court decides that patriotism is a legitimate goal that could override other free speech interests, we must analyze this goal and determine if a reasonable observer would interpret social justice teachings as an attack against patriotism. *Morse*, 551 U.S. 393, 422. As stated in *Morse*, we look to the context of the banned speech to determine how a reasonable person would interpret it. *Id.*

It is unreasonable to assume that patriotism is lost when curricula allow for diverse voices that discuss social justice issues. On the contrary, studying a broad range of perspectives in history might awaken a deeper kind of patriotism in students. Research has shown that social justice studies “involves an appreciation for the sacrifices made to achieve what racial progress has been made to date, a commitment to help shape a more racially just future for this country.”²⁶ It is potentially dangerous and unreasonable for the Department of Education to conflate the study of racial equality with hatred for one's country.

D. Discomfort is not a legitimate pedagogical goal.

Another purported purpose of this Act is to reduce feelings of anxiety that students may experience in the classroom. The act prohibits discussions that compel students to believe that “[A]n individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race, color, sex, or national origin.” §1000.05(4)(a), Fla. Stat. (2022). Florida legislators that supported the bill, like Representative Stargel, have echoed this sentiment: “The message today — and I heard it said multiple times — that we of white privilege

²⁶ Critical Race Theory: Last Week Tonight with John Oliver, YOUTUBE (Feb. 21, 2022), https://www.youtube.com/watch?v=EICp1vGh_U. (Featuring a video clip of Professor Kimberle Crenshaw arguing that “critical race theory is not anti-patriotic; in fact, it is more patriotic than those who are opposed to it, because we believe in the Thirteenth, and the Fourteenth, and the Fifteenth Amendments”)

are supposed to feel guilt and shame. I don't subscribe to that." ²⁷ Courts have previously held that fear of student discomfort is not a legitimate reason for abridging free speech rights. In *Tinker*, the court held that the State "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S., at 509. And, where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. *Id.* The court in *Hazelwood* affirmed this line of reasoning by holding a showing of discomfort does not override the constitutional right to speech, and students have freedom of expression unless there is a valid reason to regulate their speech. 484 U.S. at 281.

While it could be asserted that the Act's true goal is to instill discipline, courtesy, and respect, there is still no basis to assert that social justice teaching or critical race theory undermines these goals. ²⁸

III. The Stop W.O.K.E Act is overbroad and criminalizes a wide range of protected speech.

Even if this court were to accept the state's proffered reasons for enacting the act as having a legitimate pedagogical purpose, the statute still suffers from overbreadth issues. Overbroad laws violate the First Amendment because they punish "a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615

²⁷ Matt Papaycik, Florida's Governor Signs Controversial Bill Banning Critical Race Theory in Schools, WPTV, Apr. 22, 2022, <https://www.wptv.com/news/education/floridas-governor-to-sign-critical-race-theory-education-bill-into-law>.

²⁸ As stated above, a curriculum that focuses on race and injustice may yield better academic and behavioral outcomes for students. *Supra* Note 5.

(1973)); see also *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (holding that "a law that is overbroad may suppress constitutionally protected speech as well as unprotected speech."). Courts have also held that regulations that restrict lawful speech "must be carefully scrutinized and narrowly tailored to its purpose." This overbreadth doctrine exists to prevent the kind of chilling of constitutional speech that the Stop W.O.K.E Act creates.

The State ignores the blatantly overbroad language in the statute by claiming that the Act does not criminalize discussions about African American history. Florida Commissioner of Education Manny Diaz, Jr. posted on Twitter: "We proudly require the teaching of African American history," "We do not accept woke indoctrination masquerading as education."²⁹ In DeSantis' March 2023 news release, he attempted to "debunk" the myth that Florida does not allow for the study of African American studies.³⁰ He argued that instruction on African American History had only expanded. He cited the following as being included in Florida's official curriculum: "the history of African peoples before the political conflicts that led to the development of slavery, the passage to America, the enslavement experience, abolition, history and contributions of Americans of the African diaspora to society."³¹

The text and current application of the Stop W.O.K.E Act do not support the assertion that the act expands instead of contracts the teaching of African American history. When determining if a statute goes beyond its "plainly legitimate sweep", courts historically consider "the text of the statute, its legislative history, and its purpose" and "the way in which the law has been applied." See *United States v. Stevens*, 559 U.S. 460, 474 (2010). The Act bans discussions

²⁹ Bernstein, Sharon. "Florida 'proudly' teaches African American history, official says, as he defends rejecting AP course." Reuters, January 20, 2023, <https://www.reuters.com/world/us/florida-proudly-teaches-african-american-history-official-says-he-defends-2023-01-21/>.

³⁰ Governor Ron DeSantis Debunks Book Ban Hoax, News Release, Governor Ron DeSantis (March 8, 2023), <https://www.flgov.com/2023/03/08/governor-ron-desantis-debunks-book-ban-hoax/>.

³¹ *Id.*

that “attempt to indoctrinate or persuade students to a viewpoint inconsistent with Florida standards.” These banned discussions include conversations about social justice and culturally responsive teaching. As a result of these sweeping bans, educators have been cautious about their discussion materials potentially falling under the umbrella of prohibited topics. Philip Belcastro, an educator in Pinellas County, has interpreted the Act to mean that he might not be able to teach books with diverse authors such as *A Raisin in the Sun* by Lorraine Hansberry or *Their Eyes Were Watching God* by Zora Neale Hurston.³² Out of fear, school officials in Manatee and Duval Counties have directed teachers to wrap up their classrooms so that their books can go through more intensive reviews.³³ Renell Augustin, a high school teacher at Florida Public School, discussed that he is hesitant to discuss books relating to the suppression of the African Slave Trade. He is worried that these discussions would run afoul of the State’s ban on social justice discussions. According to Pen America, HB7 has also led to an increase in banned books like *The Bluest Eye*, *Kite Runner*, and *Beloved*. Many of these books have been pulled from shelves out of fear that school districts will violate HB7.³⁴ In addition, many educators expressed worry over the Act’s commitment to eliminating feelings of “discomfort, guilt, anguish, or any other form of psychological distress.” §1000.05(4)(a), Fla. Stat. (2022). Jeff Solocheck, an education report in Tampa Bay argues that not only is it difficult to comply with this standard but is also forces teachers to censor themselves and err on the side of caution.”³⁵

³² Alvarez, Maximillian. "You're going to see more books get banned': teachers describe Florida's war on public schools.", The Real News, April 5, 2023. <https://therealnews.com/youre-going-to-see-more-books-get-banned-floridas-war-on-public-schools>.

³³ Natanson, Hannah, Hide the Books to Stop the Felony Charges, The Washington Post, Jan. 31, 2023, <https://www.washingtonpost.com/education/2023/01/31/florida-hide-books-stop-woke-manatee-county-duval-county-desantis/>.

³⁴ Zizo, Christie. "Here are the books banned from Central Florida schools." Click Orlando, February 9, 2023, <https://www.clickorlando.com/news/local/2023/02/09/here-are-the-books-banned-from-central-florida-schools/>.

³⁵ Skoog, Tim, The politics, and policies behind Ron DeSantis, WBUR, March 3, 2023, <https://www.wbur.org/onpoint/2023/03/03/the-politics-and-policies-behind-ron-desantiss-reshaping-of-florida-education>

He goes on to state: “What might make one person feel discomfort might not make another person feel discomfort.”³⁶ This uncertainty instills fear in teachers and may cause them eliminate discussions from lectures that might violate this portion of the Act.

These examples make it evident that the current “application of the law” fosters an environment where constitutional speech is being threatened. The excessively broad reach of the Act has generated apprehension among educators, and as a result, there is an increase in diverse authors being pulled off the shelf to avoid violating the Stop W.O.K.E Act. These additional restrictions serve as a clear indication that the Stop W.O.K.E Act is overbroad and subsequently chills vital classroom discussions.

CONCLUSION

The STOP W.O.K.E Act not only limits academic freedom but also hinders the ability of Florida students to access information. We must safeguard the right of students to be exposed to a diverse array of ideas, regardless of whether these ideas are uncomfortable for lawmakers in Florida.

³⁶ *Id.*

Applicant Details

First Name	Grayson
Last Name	Metzger
Citizenship Status	U. S. Citizen
Email Address	gmmetzge@umich.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>618 S. Main St. Apt. 602</div> <div>City</div> <div>Ann Arbor</div> <div>State/Territory</div> <div>Michigan</div> <div>Zip</div> <div>48104</div> </div> </div>
Contact Phone Number	443-977-0412

Applicant Education

BA/BS From	Brown University
Date of BA/BS	May 2018
JD/LLB From	The University of Michigan Law School
	http://www.law.umich.edu/currentstudents/careerservices
Date of JD/LLB	May 6, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Michigan Law Review
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Floyd, Carrie
cfloyd@umich.edu
McQuade, Barbara
bmcquade@umich.edu
734-763-3813
Caminker, Evan
caminker@umich.edu
734-764-5221

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 03, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student at the University of Michigan Law School and I am writing to apply for a clerkship in your chambers for the 2024–2025 term.

As a former Division I athlete, I thrive in collaborative environments where I am constantly honing my craft. I am excited by the fact that clerking presents the opportunity to refine my legal writing, as well as the opportunity to contribute to and learn from the flow of ideas on a range of legal issues.

I have attached my resume, law school transcript, and a writing sample for your review. Letters of recommendations from the following professors are also attached:

- Professor Barbara McQuade: bmcquade@umich.edu, (734) 763-3183
- Professor Evan Caminker: caminker@umich.edu, (734) 763-5221
- Professor Carrie Floyd: cfloyd@umich.edu, (734) 763-7211

Thank you for your time and consideration.

Respectfully,

Grayson Metzger

Grayson Metzger

(443) 977-0412 • gmmetzge@umich.edu • she/her/hers

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL

Juris Doctor GPA 3.792

Journal: Michigan Law Review, *Senior Editor*

Activities: Oral Advocacy Competition, *Problem Design Team*

Property Tax Appeals Project, *Student Advocate*

Invited to serve on the Campbell Moot Court Executive Board 2023–2024

Ann Arbor, MI

Expected May 2024

BROWN UNIVERSITY

Bachelor of Arts in International Relations

Honors: Phi Beta Kappa; 4x NFCA Scholar-Athlete

Activities: Varsity Softball, NCAA Division I

Providence, RI

May 2018

EXPERIENCE

NEW HAMPSHIRE PUBLIC DEFENDER

Legal Intern—Eligible for student practice under N.H.R. Sup. Ct. 36

Manchester, NH

Summer 2023

VETERANS LEGAL CLINIC

Student Attorney

- Drafted a trial brief and jury instructions for a termination of tenancy case in which there was a question regarding the application of federal law to a former public housing project
- Drafted a motion to modify parenting time and child support; drafted complaint for a consumer fraud case
- Discussed case strategy and expectations with clients; engaged in settlement negotiations

Ann Arbor, MI

Fall 2022

MECKLENBURG COUNTY PUBLIC DEFENDER

Legal Intern

- Interviewed clients, reviewed video evidence, and drafted plea negotiation letters to ADAs sharing client stories and explaining mitigating factors
- Prepared internal discovery and legal research memoranda on Fourth Amendment suppression issues for drug trafficking, property, and concealed weapons cases

Charlotte, NC

May 2022 – August 2022

PUBLIC RELAY

Media Analyst

- Analyzed print, social, and broadcast media to identify trends in various markets and provide clients with detailed updates of their media coverage

Tysons Corner, VA/Remote

Dec. 2019 – June 2021

REBUILDING TOGETHER DC ALEXANDRIA

AmeriCorps Project Coordinator

- Conducted 50+ home visits and developed preliminary work scopes for senior and low-income DC homeowners in need of no-cost home repairs
- Discussed repair priorities with clients and advocated for funding to be allocated to meet client needs

Alexandria, VA/Washington, D.C.

Jan. 2019 – Dec. 2019

ADDITIONAL

- Former Division I athlete looking to bring a growth mindset and discipline to a new team environment
- **Interests:** writing poetry, pickleball, weekend hikes to look for wildflowers

Control No: E196663901

Issue Date: 05/30/2023

Page 1

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Metzger, Grayson M
Student#: 12834719



Paul R. Peterson
University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Towards Program	Credit Grade
Fall 2021 (August 30, 2021 To December 17, 2021)								
LAW	510	001	Civil Procedure	Nicholas Bagley	4.00	4.00	4.00	A
LAW	520	002	Contracts	Daniel Crane	4.00	4.00	4.00	A
LAW	580	001	Torts	Roseanna Sommers	4.00	4.00	4.00	A-
LAW	593	004	Legal Practice Skills I	Mark Osbeck he-him-his	2.00		2.00	H
LAW	598	004	Legal Pract:Writing & Analysis	Mark Osbeck he-him-his	1.00		1.00	H
Term Total				GPA: 3.900	15.00	12.00	15.00	
Cumulative Total				GPA: 3.900		12.00	15.00	
Winter 2022 (January 12, 2022 To May 05, 2022)								
LAW	530	001	Criminal Law	Barbara Mcquade	4.00	4.00	4.00	A
LAW	540	002	Introduction to Constitutional Law	Evan Caminker	4.00	4.00	4.00	B+
LAW	594	004	Legal Practice Skills II	Mark Osbeck he-him-his	2.00		2.00	H
LAW	673	001	Family Law	Tracy Van den Bergh	3.00	3.00	3.00	B+
Term Total				GPA: 3.554	13.00	11.00	13.00	
Cumulative Total				GPA: 3.734		23.00	28.00	

Continued next page >

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Issue Date: 05/30/2023

Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Metzger, Grayson M
Student#: 12834719



Paul R. Grayson
University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Towards Program	Grade
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Fall 2022 (August 29, 2022 To December 16, 2022)

LAW	536	001	Nat'l Security & Civ Liberties	Barbara Mcquade	3.00	3.00	3.00	B+
LAW	669	002	Evidence	David Moran	3.00	3.00	3.00	A-
LAW	978	001	Veterans Legal Clinic	Matthew Andres	4.00	4.00	4.00	A
				Carrie Floyd				
LAW	979	001	Veterans Legal Clinic Seminar	Matthew Andres	3.00	3.00	3.00	A-
				Carrie Floyd				

Term Total GPA: 3.700 13.00 13.00 13.00

Cumulative Total GPA: 3.722 36.00 41.00

Winter 2023 (January 11, 2023 To May 04, 2023)

LAW	459	001	Law&Hist:Econ Instit of Capit	Veronica Santarosa	2.00	2.00	2.00	A
LAW	569	001	Legislation and Regulation	Daniel Deacon	4.00	4.00	4.00	B+
LAW	641	001	Crim Just: Invest&Police Prac	Ekow Yankah	4.00	4.00	4.00	A+
LAW	730	001	Appellate Advoc:Skills & Pract	Evan Caminker	4.00	4.00	4.00	A+

Term Total GPA: 3.971 14.00 14.00 14.00

Cumulative Total GPA: 3.792 50.00 55.00

Fall 2023 (August 28, 2023 To December 15, 2023)

Elections as of: 05/30/2023

LAW	443	001	Theoretical Persp on Crim Proc	Gabe Mendlow	2.00			
LAW	480	001	MDefenders	Eve Primus	2.00			
			Public Defender Training Institute (Part I)					
LAW	642	001	Mass Incarceration	Roscoe Jones Jr	1.00			
LAW	677	001	Federal Courts	Gil Seinfeld	4.00			
LAW	681	001	First Amendment	Don Herzog	4.00			

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Page 3

The University of Michigan Law School Cumulative Grade Report and Academic Record

Name: Metzger, Grayson M
Student#: 12834719



Paul R. Peterson
University Registrar

End of Transcript
Total Number of Pages 3



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University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993	Beginning Summer Term 1993
A+ 4.5	A+ 4.3
A 4.0	A 4.0
B+ 3.5	A- 3.7
B 3.0	B+ 3.3
C+ 2.5	B 3.0
C 2.0	B- 2.7
D+ 1.5	C+ 2.3
D 1.0	C 2.0
E 0	C- 1.7
	D+ 1.3
	D 1.0
	E 0

Other Grades:

- F Fail.
- H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.
- I Incomplete.
- P Pass when student has elected the limited grade option.*
- PS Pass.
- S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)
- T Mandatory pass when student is transferring to U of M Law School.
- W Withdrew from course.
- Y Final grade has not been assigned.
- * A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

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The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499



May 23, 2023

Your Honor:

I am thrilled to recommend Grayson Metzger for a clerkship in your chambers. I had the pleasure of teaching Grayson in the University of Michigan Law School's Veterans Legal Clinic (VLC) during the fall semester of 2022. Grayson zealously advocated on behalf of her clients, demonstrating her legal acuity, ability to take initiative with little direction, and her dedication to her clients. She was an outstanding student attorney in the VLC; I am confident that she will be a devoted and exceptional clerk in your chambers.

Because I work closely with the VLC's students, I have gotten to know Grayson and her work well. The VLC provides free, direct representation to veterans in all types of civil legal aid matters, including housing, consumer, and family law cases, among others. Students are required to quickly learn unfamiliar law while balancing several cases at once and while providing high-quality legal representation. Students act as the "lead" attorneys in the cases, conducting client interviews, researching relevant legal issues, drafting pleadings, motions, and discovery, and preparing for and conducting hearings. As the supervising attorney, I review all written documents, attend all court appearances, and meet frequently with students to discuss strategic decisions to ensure high quality representation and to provide feedback on students' performance. While I review everything the students do, the students are expected to work independently, to manage and maintain relationships with their clients, the opposing counsel and the courts, and to make the strategic decisions in their cases.

Grayson has been an outstanding clinic student; she has demonstrated that she has the talent, skills, and demeanor to be an excellent judicial clerk. In one of her primary cases in the VLC, Grayson represented a client living in a subsidized housing unit in a wrongful termination of tenancy action. Grayson drafted numerous motions and pleadings in the matter, including a motion for summary disposition, a trial brief, and jury instructions. Her written work was well-drafted, polished, and persuasive. I was particularly impressed with her ability to craft accessible, well thought-out, jury instructions on a novel and untested theory of subsidized housing law. While Grayson was ultimately unable to argue the merits of her proposed jury instructions because the court adjourned the hearing, she was prepared to argue the merits and even volunteered in the clinic after her semester ended to appear at the hearing. Grayson is an excellent writer who takes great pride in her work, and I am confident she will be a strong addition to your chambers.

Not only has Grayson excelled in her written work while in the VLC, but she has adeptly represented clients under intense time pressures. In one of the clinic's larger cases – a real estate fraud case – Grayson conducted the initial interview and fact investigation for the case immediately after the client contacted the clinic. After a careful review of the client's documents, Grayson realized that the client's contract contained a one-year statute of limitations, which was



set to run four weeks after her initial interview. Grayson quickly investigated the facts of the client's dispute, conducted significant legal research to identify his claims, and skillfully drafted a compelling and well-pled, seven-count complaint all before the statute of limitations ran. Despite time pressures, Grayson was able to swiftly pivot to meet the pressing needs of the client while providing high-quality legal representation.

While Grayson's legal skills were superb, I was most impressed by her dedication and devotion to her clients. Because most of the VLC's clients are indigent, many lack transportation, internet access, and access to many basic necessities. Grayson frequently identified additional social supports and resources for her clients, while working collaboratively with the VLC's social work student to provide holistic representation. She also took additional time to meet in-person with her clients when they could not meet at the Law School or virtually. Grayson's dedication to her clients allowed her to not only address her client's pressing legal issues, but to help them access much needed social service resources. Her unique ability to empathize and to connect with clients in crisis will make her a compassionate and skillful lawyer who is able to creatively problem solve.

Grayson is a pleasure to work with. She is smart, collegial, and devoted to her work, her clients, and her colleagues. She played an integral part in building the community of the VLC last semester; she was a continuous support to her colleagues. In short, I am confident that Grayson will be an excellent judicial clerk and a strong addition to your chambers. I wholeheartedly recommend Grayson for a position within your chambers, and I would be happy to answer any other questions you may have about Grayson and her outstanding qualifications. Please feel free to contact me anytime at 734-763-7211 or by email at cfloyd@umich.edu.

Sincerely,



Carrie L. Floyd
Clinical Teaching Fellow
Veterans Legal Clinic

UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109

June 02, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Grayson Metzger for a clerkship in your chambers. Grayson is a rising third-year student at the University of Michigan Law School, where she serves as a senior editor on the Michigan Law Review. She seeks to serve as a law clerk to hone her already impressive skills to prepare for work as a public defender.

I have had the pleasure of teaching Grayson in two different classes, first-year Criminal Law, and an upper-level course, National Security and Civil Liberties. I found Grayson to be both thoughtful and quick on her feet, with a nimble ability to apply the law in various scenarios. Grayson is also a strong writer, as demonstrated in her excellent work on various writing assignments and exam problems for the two classes. These skills will serve her well as a law clerk.

Before law school, Grayson had a variety of work experiences that give her a maturity that shines through in class. Between college and law school, she interned as an analyst for the Pew Research Center, worked as an AmeriCorps project coordinator, and served as a media analyst for a public relations firm. These experiences sharpened her analytical, teamwork, and writing skills, all essential attributes for a successful law clerk and lawyer. As a law student, Grayson has earned high grades while managing to be an active member of our law school community. In addition to serving on the law review, Grayson has been a leader for a number of student organizations, including the first year Oral Advocacy Competition. Her work on the design team for the competition parallels the work of a law clerk. In addition to helping to write the problem, she researched the case law to be provided to the 120 student participants. As a college student at Brown University, Grayson earned Phi Beta Kappa honors while competing in Division I softball, an impressive feat of academic achievement and time management. Grayson's track record before and during law school indicates an ability to handle the demands of a clerkship with excellence.

I previously served as U.S. Attorney for the Eastern District of Michigan. In that role, I had the opportunity to hire more than 60 lawyers, and Grayson has the kinds of qualities that I would look for in a new hire—a strong intellect, an ability to work with others respectfully, and effective communication skills. Grayson possesses all of these qualities in abundance, which will make her a tremendous resource as a law clerk.

I know from my own experience as a law clerk that a judge's chambers can be like a family, so it is important to bring in clerks who will get along with others, respect confidences, and perform every task with enthusiasm and excellence. I think Grayson is very well suited to succeed in this environment. She will be an able assistant to any judge who hires her as a clerk. She has the intellectual capacity to tackle and solve challenging legal problems, she can express her ideas effectively in writing, and she will be a delightful colleague.

For all of these reasons, I enthusiastically recommend Grayson Metzger for a clerkship in your chambers. Please let me know if I can provide any additional information.

Sincerely,

Barbara L. McQuade
734.763-1621
bmcquade@umich.edu

Barbara McQuade - bmcquade@umich.edu - 734-763-3813

UNIVERSITY OF MICHIGAN LAW
625 South State Street
Ann Arbor, MI 48109

EVAN H. CAMINKER
Dean Emeritus & Branch Rickey Collegiate Professor of Law

May 23, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I heartily support Grayson Metzger's candidacy for a judicial clerkship. I'm confident she will be an excellent law clerk and a welcome addition to your chambers.

I have taught Grayson in two classes, a first-year Constitutional Law course (in which she earned a B+) and an upper-division Appellate Advocacy course (in which she earned a quite-rare A+). Grayson was a joy in both courses, being a thoughtful and dependable contributor to class discussions. She regularly asked very smart and on-point questions and offered provocative insights on both doctrinal and broader analytical approaches and analogies. As just one example, in Constitutional Law Grayson posited a hypothetical congressional statute that prohibited States from using the colors red, white, and blue in their official state flags. Such a statute arguably serves a legitimate federal interest in protecting the distinctiveness of the national flag; it does not "commandeer" affirmative state conduct as traditionally defined in the Supreme Court's anti-commandeering doctrine; it does not preempt any power traditionally reserved to the states as defined by subject matter; and yet it seems quite dismissive of basic principles of state sovereignty and dignity. The hypo generated a far-reaching conversation about both the propriety and challenges of invoking nontextual values in constitutional adjudication and about the substance of any such constitutional values. This was a repeated pattern: Grayson had a knack for coming up with a question or comment that helpfully illuminated or tested complicated legal concepts or doctrines.

I worked with Grayson more closely and extensively in Appellate Advocacy. This course involves an extremely rigorous and intense simulation exercise focusing on federal appellate practice. Each student prepared three long briefs (changing sides midstream) and delivered three oral arguments regarding a manufactured hypothetical involving a criminal prosecution of former President Donald Trump based on his January 6 rally. To successfully navigate the course, a student had to develop a wide range of skills, with an emphasis on sophisticated fact-based legal reasoning and nuanced approaches to persuasive communication. Grayson was a leading contributor to class discussions, and her ability to construct creative and coherent legal arguments continued to impress me. As reflected in the A+ grade, her briefs were impressively well argued and tightly crafted. But what stood out most for purposes of this reference was the effort Grayson put into learning how best to carefully read and mine the record to prompt questions that in turn can drive more nuanced legal analyses. Frankly (and disappointingly), many law students want to opine about legal principles in the abstract and have no patience for the stubborn facts. By contrast, Grayson grounded her legal argumentation in reality and maintained a healthy focus on the factual record — an obviously necessary inclination for an effective law clerk.

Grayson is a delightful young woman. She is poised and self-confident, while at the same time being a bit self-effacing. Both liked and appreciated by her peers, Grayson is warm, engaging, and amiable; I'm completely confident she'll wear extremely well in the context of a busy and high-pressure work environment.

In the near term, Grayson plans to work as a trial-level public defender in a state system. I myself can easily see her doing appellate level work in the longer term. I suspect she'll create many opportunities for herself once she demonstrates her impressive lawyering skills. Wherever her path takes her, I'm confident she'll end up making her mentors quite proud.

In sum, Grayson would be an excellent addition to your chambers. I enthusiastically recommend her for this position.

Sincerely,

Evan H. Caminker

Evan Caminker - caminker@umich.edu - 734-764-5221

Grayson Metzger

(443) 977-0412 • gmmetzge@umich.edu • she/her/hers

This writing sample is an excerpt from an appellate brief prepared for an appellate advocacy practicum. We were given a mock indictment and a closed universe of cases to answer the question of whether a former President could be criminally prosecuted for his conduct while in office.

This writing sample is my own work. I made several minor edits based on feedback from my professor at the end of the term.

Argument

I. President Trump may not be indicted under the obstruction and incitement statutes because a sitting President is not subject to criminal laws punishing “whoever” engages in the proscribed conduct.

The federal obstruction and incitement statutes do not explicitly define “whoever,” and substantive principles of statutory interpretation favor exclusion of a sitting President. Donald Trump may not be indicted under these statutes for actions taken while he was the sitting President for three reasons. First, the plain meaning of “whoever” is ambiguous with respect to the President. *See* 18 U.S.C. § 1512(c)(2)(Obstructing an Official Proceeding); 18 U.S.C. § 2101 (Inciting a Riot). Second, the Court may fairly avoid a serious separation of powers question by construing “whoever” to exclude the President. Lastly, Congress has not expressly applied these criminal statutes to the President, and thus the presidential clear statement rule precludes application to President Trump’s alleged conduct.

A. The plain meaning of “whoever” in the obstruction and incitement statutes is ambiguous.

Congress does not define the term “whoever” in either statute charged in the indictment, although it does precisely define other elements of each offense. The obstruction statute applies to “whoever corruptly” obstructs or influences an official proceeding. 18 U.S.C. § 1512(c)(2). “Official proceeding” is statutorily defined as “a proceeding before Congress” or other specified body; “corruptly” means “acting with improper purpose, purposely or by influencing another.” 18 U.S.C. § 1515. The indictment extensively cites case law to define “obstructive act,” “nexus to a[n] . . . official proceeding,” “improper purpose,” and “corrupt means.” R.1: Indictment 101, 127. Yet, the indictment neglects to define “whoever” by reference to statute or case law. Similarly, the incitement statute establishes criminal penalties for “whoever travels in interstate or foreign commerce” to incite, organize, promote, or participate in a riot. 18 U.S.C. § 2101.

Both “riot” and “to incite a riot” are defined by statute, but the indictment fails to define “whoever.” 18 U.S.C. § 2102.

The dictionary defines “whoever” as “whatever person; no matter who,” suggesting a broad meaning of the word. Merriam-Webster, <https://www.merriam-webster.com/dictionary/whoever>. However, words of such broad reach are often implicitly narrowed by context in their colloquial usage. If a person announces to her friends “whoever doesn’t have Thanksgiving plans is invited to my house,” one would not assume that she would welcome a passerby who overheard the statement into her home on Thanksgiving Day. Congress also appreciates the ambiguity inherent in words of broad meaning. Indeed, presumably responding to confusion about whether “person” and “whoever” encompass nonperson entities, Congress has clarified that both terms include “corporations, companies, associations . . . as well as individuals.” 18 U.S.C. § 1.

“Whoever” could be characterized either as a term of art or generic drafting language. It is used throughout the federal code—in the obstruction and incitement statutes at issue here, in the kidnapping statute, 18 U.S.C. § 1201 (“whoever unlawfully seizes . . .”), in the bribery statute, 18 U.S.C. § 201 (“whoever, being a public official), and in countless others. Congress may desire to proscribe specific conduct for all persons when it uses “whoever” in criminal statutes. Nevertheless, Congress is aware that the population who may ultimately be penalized for such conduct is limited by legal immunities, affirmative defenses, and determinations of competency to stand trial. For example, “whoever” applies to a person who participates in a riot, but it would not apply to that same person if the prosecutor offers him immunity to testify against the person who planned the event and provided weapons to attendees. 18 U.S.C. 2101. The meaning of “whoever” is context dependent, and thus the Court’s statutory analysis cannot end with plain meaning.

B. This Court can avoid a serious separation of powers question because it is fairly possible to interpret “whoever” in the obstruction and incitement statutes to exclude a sitting President.

“Whoever” does not unambiguously include the President and the canon of constitutional avoidance counsels against inclusion as well. This canon derives from the “cardinal principle” that the Court must consider whether there is a “fairly possible” construction of a statute that allows the Court to avoid questions raising a “serious doubt of constitutionality.” *Public Citizen*, 491 U.S. 440, 465–66 (1989) (quoting *Crowell v. Benson*, 285 U.S. 22 (1932)). The Court applies the avoidance canon most strictly where the constitutional question relates to the separation of powers. *See Public Citizen*, at 466.

The constitutional avoidance canon is triggered by the question of whether the term “whoever” in the obstruction and incitement statutes includes a sitting President. First, subjecting a President to criminal liability for conduct while in office raises separation of powers concerns similar to those addressed in the context of civil damages liability. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Clinton v. Jones*, 520 U.S. 681 (1997). Second, it is fairly possible for the Court to interpret “whoever”—an ambiguous term—to implicitly exclude the President.

1. Including the sitting President in the obstruction and incitement statutes seriously threatens to infringe on the performance of his constitutional duties.

When Congress makes laws that intrude on executive power and limit the President’s ability to perform his constitutional duties, the Court conducts a constitutional analysis. There are two possible paths of inquiry. First, where the power at issue is core to the presidency and explicitly constitutionally delegated to the President, the Court refuses to tolerate any intrusion by Congress. *Public Citizen*, 491 U.S. 440, 485 (1989) (Kennedy, J. concurring). *See also United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). Alternatively, where the power is not enumerated, but rather derived from the President’s general executive power, the Court conducts a balancing

test to determine whether congressional interests in encroaching on presidential power outweigh the burden on the President. *Fitzgerald*, at 754.

Here, the obstruction and incitement statutes facially threaten to unduly burden presidential functions. Congress has the power to make laws, and it has an interest in people following these laws. U.S. Const. Art. I, § 1; § 8, cl. 18. Specifically, the obstruction statute protects the sanctity of congressional proceedings from corrupt influence, *see* 18 U.S.C. § 1512(c)(2), and the incitement statute deters and punishes mob violence. *See* 18 U.S.C. § 2101. However, applying these statutes to the President potentially infringes on core presidential powers. Hypothetically, a President could be charged with inciting a riot for validly exercising his Commander-in-Chief power by speaking to troops before a military operation. Art. II, § 2, cl. 1. The President could also be charged with obstruction of an official proceeding for validly exercising his power to adjourn Congress. Art. II, § 2, cl. 3.

Although a conflict between the obstruction or incitement statutes and the President's core powers is imaginable, the facts of this case more likely deal with encroachment on the President's general executive power. The President frequently addresses the public, and the ability to communicate with the public naturally follows from the Vesting and Take Care clauses. Art. II, §§ 1, 3. The Office of Legal Counsel recognizes that the President's official role includes explaining, advocating, and defending policies. Office of Legal Counsel, Payment of Expenses Associated with Travel by the President and Vice President (Mar. 24, 1982). Also, in *Carroll v. Trump*, the district court conceded that presidential remarks about policies and elections are related to executive functions because they "alert the public about what the government is up to." 2020 WL 6277814 at 8 (S.D.N.Y. 2020). *Cf. Wuterich v. Murtha*, 562 F.3d 375, 384 (2009) (legislator's ability to do his job is tied to his relationship with the public and colleagues in Congress).

President Trump's actions on January 6, 2021 are well within this realm of general executive power, but the government alleges these acts are criminal because of his intent. The indictment alleges that President Trump spoke to a crowd of his supporters on the Ellipse and tweeted about the electoral count and potential election fraud. R.1: Indictment 101, 110–11. These remarks allegedly coincided with an attack on the Capitol building that forced Congress to stop the electoral count. *Id.*, at 111, 122. President Trump can be convicted for inciting a riot only if the government can show that Trump's actions proximately caused a crowd of people to forcibly enter the Capitol, and that his words were "directed to inciting or producing imminent lawless action." *Id.*, at 129 (quoting *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). Likewise, President Trump can be convicted for obstruction only if the government can prove that Trump acted "corruptly." Consequently, the intent elements of the obstruction and incitement statutes call into question the otherwise legitimate exercise of the President's executive authority.

The Court can resolve this tension by weighing the congressional interests in the obstruction and incitement statutes against the burden on the executive, but this balancing test is precisely the constitutional analysis the avoidance canon seeks to bypass. *See Public Citizen*, 491 U.S. 440, 482 (Kennedy, J. concurrence) (rejecting the majority's statutory interpretation for lack of a "fairly possible" alternative interpretation of "utilize" and proceeds to the separation of powers balancing test). *See also Fitzgerald*, at 748 n.27 (Court forced to decide the constitutional issue because the lower court had assumed a cause of action against the President).

Applying the obstruction and incitement statutes to the sitting President raises not just a doubt of constitutionality, but a *serious* doubt. In these particular circumstances, the statutes impede the President's ability to speak freely to his constituency. A finding of criminal liability here rests on whether President Trump's rhetoric is considered incendiary or hyperbolic, meant to be taken literally or figuratively. Finding that the President's broad range of discretionary

responsibility could make inquiry into his motives “highly intrusive,” the *Fitzgerald* court held that only civil damages immunity for conduct within the outer perimeter of the President’s duties could sufficiently minimize the burden on the executive branch. *Fitzgerald*, at 756–57. Here, the subjective inquiry required by both the obstruction and incitement statutes is also highly intrusive, compelling the Court to reach the constitutional analysis.

The serious doubt is not eliminated if, *arguendo*, the Court immunizes the President from criminal liability for official acts but finds that President Trump’s conduct was unofficial. First, the line between official and unofficial conduct is inherently blurred. The Office of Legal Counsel has recognized that “it is simply not possible to divide many of the actions of the President . . . into utterly official or purely political categories.” OLC Expenses Memo, at 1. The *Fitzgerald* court also recognized the difficulty in delineating “which of the President’s innumerable ‘functions’ encompassed a particular action,” and thus extended immunity to the outer perimeter of official conduct. *Fitzgerald*, at 756. The facts at hand thicken the haze. The government will surely argue that President Trump acted in an unofficial capacity when he advocated for his political supporters to interfere with the electoral count at the Capitol. But the facts alleged in the indictment just as plausibly depict a President giving a speech encouraging the crowd to exercise their constitutional right to protest.

If courts and the executive branch view the line between official and unofficial conduct as blurry, the President might be concerned how others perceive actions he genuinely believes are official. Consequently, a President could avoid official conduct for fear that the Department of Justice or a jury might consider those actions unofficial, resulting in the President’s exposure to criminal liability and the potential loss of personal liberty. Hesitation under these circumstances would frustrate the purpose of immunity for official conduct. *Cf. Fitzgerald*, at 756 (rejecting a functional approach to presidential immunity because inquiry into the

President's motives would "deprive immunity of its intended effect"). Thus, a serious doubt of constitutionality is raised if either unofficial or official presidential conduct is covered by the obstruction and incitement statutes, and the Court should avoid including the President if there is a fairly possible alternative construction of these statutes.

2. It is fairly possible to exclude the President from the term "whoever" in these statutes.

The Court may avoid constitutional questions only where an alternative interpretation of the statute is "fairly possible" or "otherwise acceptable." *Public Citizen*, at 465–66. Interpreting "whoever" to exclude the President is fairly possible because the word is ambiguous, exclusion would be consistent with the purposes of existing immunity, and Congress can amend statutes as needed.

First, "whoever" is an ambiguous term frequently used in criminal statutes. *See supra* Section I.A. Although Congress plausibly intends to deter all persons from engaging in particular conduct when it uses the word "whoever," the word does not definitively capture who may be punished for such conduct. Various immunities (diplomatic, witness), affirmative defenses (insanity, necessity), and competency evaluations limit who may be punished for acts Congress has criminally proscribed. The Court has previously found that ambiguity in a statutory term invites alternative interpretations where a constitutional issue is at stake. In *Franklin v. Massachusetts*, for example, the Court considered whether to include the President in the term "agency," which would have allowed judicial review of his actions under the Administrative Procedure Act. 505 U.S. 788 (1992). In finding that inclusion would violate the separation of powers, the Court added the President to a list of exclusions already expressly listed in the APA. *Id.* at 800. In *Public Citizen*, the Court promptly invoked the constitutional avoidance canon after finding that an unqualified reading of the word "utilize" would lead to absurd results. 491 U.S. 440, 452–55. The term "whoever" analogously invites alternative interpretations.

Second, interpreting “whoever” to exclude the President in the obstruction and incitement statutes is consistent with the purposes of the immunity doctrine. In granting civil immunity to public officials, the Court has repeatedly concluded that absolute immunity for official acts prevents officials from hesitating to exercise the discretion inherent in their duties. *See Spalding v. Vilas*, 161 U.S. 483, 499 (1896) (Postmaster General); *Pierson v. Ray*, 386 U.S. 547 (1967) (state judges); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (state prosecutors). While absolute immunity is reserved for officials with particularly sensitive responsibilities—such as judges, prosecutors, heads of executive branch departments—the Court also recognizes immunity for other public officials for acts performed in good faith. *See Butz v. Economou*, 438 U.S. 478 (1978) (federal executive officials); *Pierson v. Ray*, at 557 (police officers). *See also Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (establishing an objective standard for the qualified immunity “good faith” inquiry). Time and again the Court has acknowledged that the public interest suffers when government officials second-guess their decisions. *Id.* Where civil damages liability distorts decisionmaking, criminal liability incentivizes even greater caution. If immunity from criminal liability is imaginable—even if only for official acts—it is equally plausible to exclude the President from criminal laws of general applicability as a matter of statutory interpretation.

Lastly, excluding the President from the obstruction and incitement statutes does not place an insurmountable burden on Congress that would render the interpretation impossible or unacceptable. Congress could easily amend the obstruction and incitement statutes to include the President. To preempt statutory ambiguity in the future, Congress could pass a law clarifying that the term “whoever” includes the President of the United States in all statutes in which the word appears. This law would be similar to the Dictionary Act, in which Congress clarified that “in determining the meaning of any Act of Congress, unless the context indicates otherwise— . . . ‘whoever’ include[s] corporations . . . as well as individuals.” 1 U.S. § 1. Given the separation of

powers issues at stake when laws potentially chill presidential conduct, Congress should make a conscious choice whether to sweep broadly or to carefully consider every statute's effect on the President.

C. The clear statement rule would require an express statement by Congress before applying the obstruction and incitement statutes to a sitting President's official conduct.

1. The Supreme Court established a clear statement rule in *Franklin v. Massachusetts*.

Bolstering the constitutional avoidance argument, the clear statement rule established in *Franklin v. Massachusetts* guides the Court to exclude the President from the scope of the obstruction and incitement statutes. 505 U.S. 788 (1992). In *Franklin*, the Court considered whether the term “agency” in the Administrative Procedure Act included the President, thus subjecting the President's actions in the reapportionment process to judicial review. On the issue of reviewability under the APA, the Court stated that it “would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.” *Franklin*, at 801. Assuming the President was included in the statute would raise significant separation of powers concerns and the Court was not willing to let “textual silence” dictate such a result. *Id.*

In creating the clear statement rule, the *Franklin* court cited a footnote from *Nixon v. Fitzgerald* which implied that the Court could approach presidential immunity differently in circumstances where Congress had created an express cause of action against the President. *Fitzgerald*, at 748 n.27 (1982). The *Fitzgerald* court acknowledged that the disposition of the case assumed an implied cause of action, requiring the Court to reach the question of absolute presidential immunity from civil damages liability. The tenor of footnote 27 suggests that, had the Court presided over the *Fitzgerald* case itself, it might not have found that an implied cause

of action existed in the first place. *Franklin* expounds upon this sentiment to flesh out the bounds of the clear statement rule.

In its motion to dismiss, the government states that neither *Franklin* nor *Public Citizen* “announces such a rule nor rests its holding on such a rule,” R:3 at 301, begging the question—if the Court intended to announce a “clear statement rule,” why did it not explicitly say so? Yet, the *Franklin* court emphatically and consistently announced its intentions. In half a page the Court stated three separate times that it would require an express statement by Congress before proceeding: “[T]extual silence is not enough to subject the President to the provisions of the APA;” “[W]e would require an express statement by Congress before assuming it intended . . . review[] for abuse of discretion;” “As the APA does not expressly allow review . . . we must presume that [the President’s] actions are not subject to its requirements.” *Franklin*, at 800–01. Also, the clear statement rule is a natural extension of the longstanding constitutional avoidance canon. The rule uniformly sidesteps the specific constitutional issue created when federal statutes are applied to the President—that is, potential disruption of the proper balance of power between the branches of government. The *Franklin* court clearly explained that Congress must expressly signal its intent to include the President in generally applicable statutes. *Id.*

[. . .]

Applicant Details

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Contact Phone Number	3188344162

Applicant Education

BA/BS From	Tulane University
Date of BA/BS	May 2021
JD/LLB From	New York University School of Law
	https://www.law.nyu.edu
Date of JD/LLB	May 22, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Law Review
Moot Court Experience	No

Bar Admission**Prior Judicial Experience**

Judicial Internships/Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Chris Moore
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June 12, 2023

The Honorable Jamar Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a second-year student at NYU School of Law and Executive Editor of the NYU Law Review. I am writing to apply for a 2024-2025 term, or any subsequent term, clerkship in your chambers.

I am particularly interested in a clerkship with you because of your previous experience as an Assistant United States Attorney. As you will see from my enclosed resume, I spent last summer interning at the United States Attorney's Office for the Southern District of New York. Moreover, as a Research Assistant to Professor Barry Friedman, I conducted extensive research about state analogues to the Federal Third-Party Search doctrine. I believe these experiences, along with my role on Law Review, have prepared me for a clerkship in your chambers.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. My writing sample is a paper I wrote for my Corporate Crime and Financial Misleading Seminar examining the validity of the right to control theory of fraud. Also enclosed are letters of recommendation from Professors Barry Friedman and David Simson. Brandon Harper, Assistant United States Attorney for the Southern District of New York, has also agreed to serve as a reference.

If you have any questions, please feel free to contact me at the above address and telephone number. Thank you for considering my application.

Respectfully,
/s/
Chris Moore

CHRISTOPHER MOORE

110 West 3rd Street, New York, NY 10012 | 318-834-4162 | christopher.moore@law.nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY

Candidate for J.D., May 2024

Honors: *Law Review*, Executive Editor
Dean's Award Scholarship- *partial tuition scholarship based in part upon academic merit*
Sudler Family Fellowship

Activities: Black Allied Law Students Association, Member
Prosecution Legal Society, Member
Government Civil Litigation Clinic, SDNY (Fall 2022)
Policing Project Legal Fellow (Fall 2023)

TULANE UNIVERSITY, SCHOOL OF LIBERAL ARTS, New Orleans, LA

Bachelor of Arts in History & Political Science, May 2021

Honors: Dean's List (Spring 2018-Spring 2020)

Activities: Alpha Phi Alpha Fraternity Inc., President
Mock Trial Team, Competitor
TIDES (Tulane Interdisciplinary Experience Seminar), Peer Mentor
TEDxTulane, Curator

EXPERIENCE

DEBEVOISE & PLIMPTON, New York, NY

Summer Associate, Summer 2023

U.S ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK, New York, NY

Legal Intern, Criminal Division, Summer 2022

Performed legal research and drafted trial court motions, briefs, and legal memoranda regarding a variety of criminal proceedings. Closely collaborated in trial preparation; investigated evidence, evaluated complex legal issues, and interviewed and corresponded with witnesses.

PROFESSOR BARRY FRIEDMAN, NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY

Research Assistant, Summer 2022

Conducted extensive legal research and writing in the area of Criminal Procedure, including an analysis of the privacy policy implications of the Supreme Court's ruling in *Carpenter v. United States*.

GREATER NEW ORLEANS INC., New Orleans, LA

Policy and External Affairs Intern, August 2018 - May 2019

Researched and developed talking points for policies related to economic development including early childhood education, higher education, and pension reform. Examined the impact of international tariffs on local industries.

OFFICE OF COUNCIL MEMBER JASON WILLIAMS, New Orleans, LA

Legislative Intern, June - August 2018

Collaborated in preparing statements for the Councilman to present at City Council meetings. Met with constituents concerning a variety of issues. Proposed policies focused on increasing youth involvement in government.

OFFICE OF THE MAYOR OF NEW ORLEANS, New Orleans, LA

Executive Office Assistant Intern, September 2017 - May 2018

Researched previous press stories for various media pitches. Assisted in preparation for mayoral interviews.

ADDITIONAL INFORMATION

Enjoy cooking, swimming, and reading in my free time. Worked as a camp counselor for two summers while in college. Volunteered with an organization that provides mentorship to fatherless youth in college.

Name: Christopher A Moore
 Print Date: 05/31/2023
 Student ID: N16685405
 Institution ID: 002785
 Page: 1 of 1

New York University
 Beginning of School of Law Record

Current	AHRS	EHR
Cumulative	15.0	15.0
	45.0	45.0

Fall 2021

School of Law Juris Doctor Major: Law				
Lawyering (Year)	LAW-LW 10687	2.5	CR	
Instructor: David Simson				
Torts	LAW-LW 11275	4.0	B	
Instructor: Mark A Geistfeld				
Procedure	LAW-LW 11650	5.0	B+	
Instructor: Helen Hershkoff				
Contracts	LAW-LW 11672	4.0	B	
Instructor: Richard Rexford Wayne Brooks				
1L Reading Group	LAW-LW 12339	0.0	CR	
Instructor: Christopher Jon Sprigman				
	AHRS	EHR		
Current	15.5	15.5		
Cumulative	15.5	15.5		

Spring 2023

School of Law Juris Doctor Major: Law				
Constitutional Law	LAW-LW 11702	4.0	B	
Instructor: Peter Milo Shane				
Property	LAW-LW 11783	4.0	B	
Instructor: David Jerome Reiss				
Introduction to Accounting and Finance	LAW-LW 12337	3.0	CR	
Instructor: April Klein				
The Elements of Criminal Justice Seminar	LAW-LW 12632	2.0	A-	
Instructor: Preet Bharara				
	AHRS	EHR		
Current	13.0	13.0		
Cumulative	58.0	58.0		
Staff Editor - Law Review 2022-2023				

End of School of Law Record

Spring 2022

School of Law Juris Doctor Major: Law				
Lawyering (Year)	LAW-LW 10687	2.5	CR	
Instructor: David Simson				
Legislation and the Regulatory State	LAW-LW 10925	4.0	B	
Instructor: Adam B Cox				
Criminal Law	LAW-LW 11147	4.0	A-	
Instructor: Ekow Nyansa Yankah				
1L Reading Group	LAW-LW 12339	0.0	CR	
Instructor: Christopher Jon Sprigman				
Criminal Procedure: Police Practices	LAW-LW 12697	4.0	B+	
Instructor: Barry E Friedman				
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR	
	AHRS	EHR		
Current	14.5	14.5		
Cumulative	30.0	30.0		

Fall 2022

School of Law Juris Doctor Major: Law				
Complex Federal Investigations Seminar	LAW-LW 11517	2.0	B-	
Instructor: Katherine R Goldstein Parvin Daphne Moyne				
Evidence	LAW-LW 11607	4.0	B+	
Instructor: Erin Murphy				
Government Civil Litigation Externship- Southern District	LAW-LW 11701	3.0	B	
Instructor: Seungkun Kim Monica Pilar Folch				
Government Civil Litigation Externship - Southern District Seminar	LAW-LW 11895	2.0	B+	
Instructor: Seungkun Kim Monica Pilar Folch				
Corporate Crime and Financial Misdealing: Legal and Policy Analysis Seminar	LAW-LW 12243	2.0	A-	
Instructor: Jennifer Hall Arlen Joseph P Facciponti				
Research Assistant Summer 2022 Research Assistant	LAW-LW 12589	2.0	CR	
Instructor: Barry E Friedman				

May 22, 2023

Your Honor:

Please accept this enthusiastic letter of recommendation for Chris Moore to serve as a law clerk in your chambers. I had the pleasure of working with Chris during his 2022 summer internship in the U.S. Attorney's Office and have found him to be bright, energetic, hardworking, and collaborative. I believe that Chris will make a terrific lawyer and law clerk.

I serve as an Assistant United States Attorney in the Criminal Division of the United States Attorney's Office for the Southern District of New York. I am currently on detail to the Office of the Deputy Attorney General in the Department of Justice. I had the pleasure of clerking for both a United States District Judge and a United States Circuit Judge after law school.

I worked with Chris on numerous cases during his summer in the U.S. Attorney's Office, including during the research stage, briefing, and trial. He always demonstrated an exceptional work ethic and he routinely produced high-quality work. For example, Chris's research and writing were instrumental in helping to craft a response to a motion for compassionate release. The issues in the case were complex, and the factual record was extensive. Nevertheless, Chris provided strong research about the relevant legal questions and offered excellent assistance during the brief drafting phase. In another instance, Chris provided invaluable support on a case that was headed toward trial. He helped the team dig deep into the factual record and gave excellent feedback during several opening statement and closing argument moots. Chris even stayed late and came in early as the case approached trial (entirely on his own and without being asked). He very quickly became an indispensable member of the team.

There is no question based on the summer I spent working with Chris that he is passionate about the law, motivated to by doing what is right, and genuinely excited about the prospect of serving as a law clerk. Of all the legal interns, paralegals, and other staff at the U.S. Attorney's Office with which I have worked, Chris easily ranks in the top 10%. He is intelligent, hardworking, dedicated to the mission, and a strong critical thinker. Chris can analyze complex legal issues, distill those issues into the important points, and clearly articulate legal analyses through his writing. He no doubt possesses the skills necessary to be an effective law clerk.

Thank you for your time and for considering Chris's application. It was a pleasure to work with Chris and I am delighted to offer this recommendation. Please do not hesitate to contact me with any questions. I can be reached by email at brandon.harper2@usdoj.gov.

Sincerely,

/s/ Brandon D. Harper

Brandon D. Harper



David Simson
Associate Professor of Law

185 West Broadway
New York, NY 10013
Cell: (310) 966-0685
Email: david.simson@nyls.edu

June 12, 2023

RE: Christopher Moore, NYU Law '24

Your Honor:

I am writing to strongly support Christopher Moore in his candidacy for a judicial clerkship. I recently transitioned to an Associate Professor position at New York Law School, but until May of 2022 I was an Acting Assistant Professor of Lawyering at NYU Law School. There, Chris was a student in my Lawyering class of 32 students during the 2021-22 school year. The work-intensive nature of the Lawyering course and the individualized engagement with students that it involves allowed me to get to know Chris and his work better than other law school classes. In my course, Chris demonstrated great professionalism and resilience, an impressive trajectory in his lawyering skills development, and a kind, empathetic, and generous personality that made him a valued contributor to groups small and large. I believe that all of these attributes will make him a valued and effective member of chambers and thus I strongly support his clerkship application.

As background for my interactions with Chris, the Lawyering Program is a key part of the first-year curriculum at NYU Law School. It asks students to engage in a wide variety of tasks that include, but go significantly beyond, the traditional legal research and writing assignments that most law schools emphasize. In addition to completing such research and writing assignments, students learn how to navigate class discussions and in-class simulations of various types, give peer feedback in small critique conferences, interview and counsel mock clients, participate in mock mediations and negotiations, practice their professional emailing skills, and prepare for and present an oral argument with external judges. The goal in exposing students to all of these challenges is to introduce them to the complex, interactive, context-sensitive, and interpretive work required to excel in legal practice.

Some of these tasks came more naturally to Chris while others required an adjustment to new and at times unintuitive ways of doing things. But what made Chris stand out in my class is that he tackled all of these tasks with a combination of attributes that I believe will make him an excellent clerk: A very strong work ethic, dedication to continuously improve, and resilience in the face of challenges; as well as an uncanny ability to combine that work ethic with a kind, humble, and warm personality dedicated to contributing deeply to the success of the many teams of which he was a part.

I believe that the attribute that will perhaps most allow Chris to do excellent work and make a positive impact both as a clerk and throughout his career is his professionalism and resilience. In my class, Chris most tangibly (though certainly not exclusively) demonstrated this professionalism and resilience in the way in which he handled adjusting to the unique

Christopher Moore, NYU Law '24

June 12, 2023

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conventions and demands of legal writing. In my years of teaching legal writing, I have found that the idiosyncratic conventions of legal writing—especially when combined with the additional idiosyncrasies of the demands of each individual legal writing professor—can be very challenging for some students to adjust to, especially students who were trained and highly skilled in other writing approaches prior to law school. Chris experienced these challenges in my course, but what I believe will make him a great clerk is not that he did, but how he handled them. Chris once shared with me that in college he had done work as a writing tutor, and in his initial assignments I could tell that he had a strong skill set for types of writing such as what I would expect in policy analysis and the like. What did not always seem to come naturally for Chris was taking this kind of writing and adjusting it to the very specific and unforgiving structure of legal argument that I taught in my class. Thus, in early assignments, Chris worked through some struggles with things such as ordering different kinds of information within the structure of a legal argument, how specifically to integrate and marshal legal authority in different parts of a legal argument, and the like.

Chris was, of course, not unique in experiencing such struggles, but he did stand out in the way in which he responded to them. Rather than, as many other students did, being somewhat combative and resisting the extensive and detailed feedback that I provided to each student, Chris embraced the challenge with a positive mindset. For the first major writing assignment, for example, Chris was the only student who not only reached out to speak with me in person multiple times to take advantage of the opportunity to clarify his understanding and approach, but he also completed extra iterations of the assignment so that he could practice what to him was still a somewhat unintuitive way of making arguments. Because my class was not graded, each student had the option of reaching out to me for feedback as often as they thought helpful, but precisely because my class was not graded, almost no students actually did so. Chris did, recognizing how important it would be for his future development as a lawyer, and he did so with skill and determination. Rather than haggling with me (as some of his colleagues did) over why he wasn't right in the way he wrote after all, Chris asked for feedback, exposed his work to further critique, improved his craft, and repeated the process again and again. This is what I consider a hallmark of a successful lawyer—a dedication to honing one's craft throughout one's career—and Chris showed to me that for him this is not just an unavoidable but annoying demand of the job, but the way he approaches his life. This will serve him very well as a clerk, as well as in his career in general, in my opinion. That he did all of this while navigating the innumerable stresses and anxieties of the first year of law school makes this even more remarkable.

As a result, the trajectory of Chris's skills development over the course of the year in my class was truly impressive. Chris's written work product went from a source of struggle to being in the stronger half of the class by the time of his final writing assignment—a jump that I do not remember any other of my students making. I am, moreover, confident that Chris has continued this trajectory since. Thus, I believe that not only will Chris be able to deliver high-quality work product from Day 1 of his clerkship, but more importantly still, that he will actively seek out the innumerable learning opportunities that a judicial clerkship provides and that he will take skilled advantage of them to continue to improve his craft and contributions

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every single day. To me, this is the kind of person that I would want to work with and I hope you strongly consider Chris's application in this light.

In addition to having the kind of professionalism and resilience described above, Chris is also kind, empathetic, and generous, which made him a valued contributor to groups small and large in my course. I distinctly remember how Chris by random selection ended up being teamed up with two of the more challenging students in my course in what was a weeks-long simulation that involved various assignments ranging from interviewing to memo writing to client counseling. One of Chris's teammates was smart but struggled connecting interpersonally, and the other had decided to deprioritize my course yet was both in denial and combative about this fact. Chris worked hard to nevertheless ensure that his team worked as successfully as possible, and never deflected responsibility to his teammates. Thus, in the group's simulated client interview, it was clear that one of Chris's teammates had a hard time empathizing with the client in what was an emotionally charged employment discrimination case, and the other was not very well prepared. Chris did what he could to make the team do its best nevertheless. He took on the opening part of the interview, and my notes from watching the interview repeatedly stress how Chris did a great job empathizing with the client, allowing the client to tell their story, and soliciting relevant information effectively. Chris also jumped in to fill gaps even in parts of the interview that were not technically "assigned" to him.

In the group feedback session, Chris still never called out his colleagues but instead focused on what the team could do better moving forward. This contrasted strongly with one of his colleagues, who instead asked me to work with other students in the future because he did not feel like he got along with the third teammate's personality. Once again, Chris was a true professional who was able to work across differences to ensure greater team success despite this involving both a stressful experience and a lot of work for him. In my view, this skill, too, will serve Chris well both as a clerk and as a lawyer—environments in which strong and (at times) difficult personalities abound and in which team success often depends on people with the skillset and professionalism that Chris demonstrated throughout my course.

Lastly, I believe that Chris is very well-suited to succeed as a clerk because he has a clear vision for his career and how clerking fits within it. Chris has developed a particular interest in prosecutorial work, and I know from both our conversations and his other materials that he has worked diligently to seek out and take advantage of opportunities to prepare himself for success in this competitive arena—whether it be working as a research assistant, writing projects, internships, or student organizations. Chris has thought clearly about how being exposed to, and contributing to, the daily work of the judiciary will help him understand not only the work of an institution that he can expect to work closely with as a prosecutor, but also the many different possible approaches that prosecutors and other lawyers take in court and what he can learn from them to improve his own craft still further.

When the above is taken together, I hope that a clear picture emerges of Chris as a person who is thoughtful (a fact which he also demonstrated in class discussions of many

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kinds), highly skilled, hard-working, dedicated to and capable of improving his craft no matter the obstacles, and yet kind, generous, empathetic, and a true team player. While this and the above thoughts can of course only provide a small window into the mosaic of reasons why I believe that Chris is an exceptional clerkship candidate. I hope, however, that they are still helpful in your decision-making process. Of course, if you have any questions or would like additional information, please do not hesitate to contact me at david.simson@nyls.edu or at (310) 966-0685.

Sincerely,

A handwritten signature in black ink, appearing to read "Simson", with a stylized, flowing script.

David Simson
Associate Professor of Law
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Barry Friedman

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Dear Judge,

I am writing on behalf of Chris Moore, who is applying to clerk in your chambers beginning any time after he graduates in the Spring of 2024. I have worked with Chris in a wide variety of capacities, and I'm a big fan. I strongly encourage you to consider him.

I first got to know Chris when he took my 1L Criminal Procedure elective. This was still during the pandemic, and no easy time, but Chris was a standout student. He participated frequently, he was always on top of the material, and he was equally consistently a spark of humor and grace. He did well on the exam, and I affirmatively was grateful to have him in class. He also came to office hours, and showed real interest in the material.

Based on my experience with Chris, I asked him to work as my RA, as he has done for some time. He worked on a variety of projects, from the development of the right to carry arms and its relationship to policing, to projects about whether and how law enforcement should be able to collect and store data on individuals. I saw his work from initial research and memo writing to footnoting. Chris is a hard worker who takes the job seriously. His work was always on time and helpful to the projects. He had real insight at times.

I yet again asked Chris to work with me, interviewing for a position as a Fellow at the Policing Project that I founded, which works to bring democratic accountability to policing. My team recently enthusiastically chose him as a Fellow, and I am happy that our professional relationship will continue.

Chris's long term interests are to be a prosecutor, and to work in a large law firm before that. From the time he arrived here, Chris has interests in being a prosecutor. What is admirable is that he has pursued learning and experiences on all sides of the criminal legal system. That is classic Chris—to see things from all sides, and want to understand them that way.

Chris has had an incredible career here. He is an Executive Editor for the Law Review, treasurer for the Prosecution Legal Society, and been involved in BALSAs. As is apparent, he is one of those people that dives into things with enthusiasm, and given my experience with him I'm sure he is received enthusiastically wherever he goes.

Chris is going to be a good law clerk. He is a hard worker and deeply engaged in all he does. I'm particularly impressed with how far along his writing has come from his time as an RA. I just read a paper he wrote on Right to Control, and it was extremely clear. His efforts have paid off. He's smart and savvy both. He has spent time working with government, and that pragmatic side shows in all he does.

It doesn't take long knowing Chris to realize he is a special and stellar person, engaging, kind, funny, caring, and deeply responsible. I like him a great deal.

I am pleased to recommend Chris to you, and urge you to interview him. Please do not hesitate to contact me if you have any questions.

Best regards,



Barry Friedman

The Right to Control: A Step Too Far?

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I. Introduction

The Supreme Court is set to determine the validity of the right to control theory in *United States v. Ciminelli*. The theory is much maligned, and many in the legal community expect the Court to limit the application of the theory at the least, if not completely strike the theory down. This paper seeks to examine the validity of the theory and some questions that the Court must consider in deciding how to address the right to control. Ultimately, this paper argues that despite heavy, albeit justified, criticism of the theory, the Supreme Court should limit its use rather than abandon it completely.

II. United States v. Ciminelli

In 2012, Andrew Cuomo, New York Governor at the time, launched the “Buffalo Billion” initiative to develop the Buffalo area with \$1 billion in taxpayer funds. Alain Kaloyeros, the head of the College of Nanoscale Science and Engineering (“CNSE”), hired Todd Howe, a consultant and lobbyist with connections to the Cuomo administration.¹ Through Howe, Kaloyeros was charged with developing proposals for projects under the Buffalo Billion initiative. Howe had two construction-company clients: LPCiminelli, owned by Louis Ciminelli, and COR Development Company, owned by Steven Aiello and Joseph Gerardi.² A year after the initiative was announced, Kaloyeros and Howe began plotting to deliver the Buffalo Billion contracts to Howe’s clients.³ Despite Kaloyeros’ control over the initiative, Fort Schuyler Management Corporation (“FS”) was in charge of project selection.⁴

Interested parties were notified of the need for the project through request-for-proposals and were evaluated by FS through a bidding process.⁵ Kaloyeros and Howe used two methods to avoid FS’s ordinary bidding process. First, Kaloyeros proposed the issuance of two RFPs, which designated the successful bidders as the “preferred developer” for the region, giving the preferred developer the opportunity to negotiate with FS before FS had even designated a specific project.⁶ Second, Kaloyeros and Howe tailored these RFPs to benefit LPCiminelli and COR development. Howe, Aiello, Gerardi, and Ciminelli created a list of qualifications for preferred developers that matched the characteristics of the two companies.⁷ Despite the imposition of a “blackout period” where communications between interested contractors and issuers of RFPs were only allowed in the open, the parties communicated in private.⁸ In response to public scrutiny, Kaloyeros modified one of the RFP qualifications and claimed that the prior qualifications was a “typographical error.”⁹

¹ Brief for Appellee, at 7, *United States v. Ciminelli*, No. 18-2990 (2d Cir. Aug. 29, 2019).

² *Id.* at 35.

³ *Id.*

⁴ *Id.* at 30.

⁵ *Id.* at 32.

⁶ *Id.* at 33.

⁷ *Id.*

⁸ *Id.* at 42.

⁹ *Id.*

At the same time that Kaloyeros guaranteed Ciminelli that his company would win the contract he allowed Ciminelli to choose the second preferred developer.¹⁰ While Kaloyeros was not involved in the official process of evaluating bids, he never disclosed his involvement with the companies.¹¹ As a result of their efforts, Ciminelli, and the bidder that he favored, became the preferred developers in Buffalo. LPCiminelli was awarded a \$750 million construction project.¹² Despite completing the projects satisfactorily, Kaloyeros, Ciminelli, Aiello, and Gerardi were indicted for conspiracy to commit wire fraud in 2017. Ciminelli was convicted a year later and sentenced to 28 months of imprisonment. After losing in the Second Circuit, Ciminelli appealed to the Supreme Court and is now awaiting a decision.

III. Federal Mail and Wire Fraud Statutes

The federal mail and wire fraud statutes are nearly identical—the only difference between them is the means of perpetrating the fraud. The essential elements of both mail and wire fraud are (1) an intent to defraud; (2) a fraudulent scheme to obtain money or property involving material misrepresentations; and (3) use of the mails or wires to further the scheme.”¹³ The scheme to defraud does not have to be successful or completed for a prosecution under the statute to be successful. Thus, the prosecution does not have to show that the victims of the scheme were actually injured, only that the defendant contemplated injury to the victim. A common example of a fraud prosecution under these statutes is “phishing.” This occurs when person A emails people with a false story about why they need money immediately and person B sends them \$100. A fraud prosecution here would be successful, as the email soliciting money with a false story satisfies the intent to defraud, scheme to obtain money or property, and use of wires elements of the wire fraud statute. Due to the proliferation of electronic technology, these statutes apply to a wide range of behavior. As a result, they have become a favorite of white-collar prosecutors. However, there is a class of fraud cases that are pushing the limits of this statute.

IV. The Right to Control

While most fraud prosecutions require a showing that the defendant injured the victim in their tangible money or property rights, there are some cases that focus on intangible property rights. The right to control theory is a theory of fraud prosecution in which the government argues that the defendant injured the victim of an intangible property right to economically valuable information by making a misrepresentation or withholding that information from the victim.¹⁴ This can still be proven even if the victim hasn’t suffered a pecuniary loss or an injury to a more traditional property right, such as loss of ownership or possession. This theory has become a

¹⁰ *Id.*

¹¹ *Id.* at 45.

¹² *Id.* at 46.

¹³ 18 U.S.C. § 1341; 18 U.S.C. § 1343

¹⁴ Jennifer Bouriat, *The Right to Control Theory--What It Is, How It Is Used, and How to Defend Against It*, 44-OCT Champion 38, 38 (explaining what the right to control theory is).

favorite of prosecutors because it allows deception in business dealings, that may otherwise go unpunished, to be prosecuted. However, not everyone is as happy about the theory's development as prosecutors. Critics frequently decry the doctrine as too broad and contend that it criminalizes a range of activity that Congress did not intend to capture through the federal fraud statutes. Before diving into the validity of the theory, it is helpful to outline in detail what elements the government must satisfy to successfully prosecute under the right to control theory.

A. The Elements of the Right to Control

Because the theory originated in, and is used most often in the Second Circuit, this Circuit's cases will form the basis for examining what the theory requires. In interpreting the fraud statutes, the Second Circuit has said that intangible rights can satisfy the property element under the mail and wire fraud statutes in certain circumstances.¹⁵ The intangible property at issue in right to control prosecutions is "potentially valuable economic information" and the resulting effect on the victim's control of assets.¹⁶ However, the government must still prove the traditional elements of fraud. The Second Circuit has defined those elements in a right to control prosecution as requiring that the government establish that the defendant, "(1) had an intent to defraud; (2) engaged in a fraudulent scheme to obtain money or property "involving material misrepresentations—misrepresentations that would naturally tend to influence or are capable of influencing the victim's decision-making, and (3) used the wire to further that scheme."¹⁷ Since the last element is uncomplicated, the first two will be examined in greater detail.

i. Intent to Defraud

The intent to defraud element, as applied in right to control cases, disregards whether the victim received the benefit of the bargain, and focuses on whether the defendant's deception affected the very nature of the bargain between the defendant and the victim.¹⁸ Fraudulent intent may be evident when "the false representations are directed to the quality, adequacy, or price of the goods themselves...because the victim is made to bargain without facts obviously essential in deciding whether to enter the bargain."¹⁹ The defendant can be liable for fraud, even when no contract was breached and the victim appeared to have received the full economic benefit of the deal, if the misrepresentation concerns a central part of the bargain that would have affected the parties' willingness to engage in the transaction.²⁰ The Second Circuit has further said that satisfying the intent to defraud element requires the government to show that the defendants,

¹⁵ See *Carpenter v. United States*, 484 U.S. 19, 25 (1987) (describing how the scope of mail fraud was not limited to tangible property rights).

¹⁶ *United States v. Finazzo*, 850 F.3d 94, 108 (2d Cir. 2017).

¹⁷ *United States v. Johnson*, 939 F.3d 82, 88 (2d Cir. 2019); *United States v. Bunday*, 804 F.3d 558, 569 (2d Cir. 2015).

¹⁸ *Johnson*, 939 F.3d at 89.

¹⁹ *Bunday*, 804 F.3d at 578.

²⁰ *Johnson*, 939 F.3d at 89.

“contemplated some actual, cognizable harm or injury to their victims.”²¹ Proving this when the focus of the scheme is intangible property is considerably more challenging than when it is tangible property or money. This is because it is not always clear that a defendant specifically contemplated harming the victim, rather than just trying to negotiate a better deal for themselves, by making false representations. Despite the difficulty, prosecutors have been able to satisfy this requirement by showing that the defendants’ misrepresentations exposed the victims to unexpected economic risks.²² This has also been shown when the defendants’ misrepresentations exposed the victim to penalties that do not seem monetary on the surface. This includes the possibility of reputational damage or the loss of goodwill in their industries.²³ Lastly, this can also be found when the misrepresentations impact the quality of goods or services that the victim bargains for.²⁴

ii. Material Misrepresentations

The second element that must be proved in a right to control prosecution is that the defendant engaged in a fraudulent scheme to obtain money or property involving material misrepresentations. As mentioned above, these are misrepresentations that would naturally tend to influence or are capable of influencing the victim’s decision-making.²⁵ A misrepresentation is material if it can “influence the intended victim.”²⁶ The court in *Johnson* instructs prosecutors that this requirement is different from the showing of fraudulent intent that requires demonstrating that the material misrepresentation must be “capable of resulting in tangible harm.”²⁷ Thus, however subtle the line between these two elements is, it is important not to conflate the two requirements.

B. Applications of the Right to Control

Now that the elements of the theory have been described, it is helpful to see how it has played out in actual cases. There are several situations where the right to control theory has been applied, some more logical than others. The first is where the defendant injures the victim after the fact by giving the victim less than they bargained for. Application of the theory in this instance is uncontroversial because it is obvious that the victim has lost money, goods, or other property because of the defendant’s scheme. As mentioned above, another way that harm is shown in right to control cases is when the defendant’s misrepresentations can expose the victim to unexpected economic risks. *United States v. Bunday* and *United States v. Mittelstaedt* are examples of this.

²¹ *Finazzo*, 850 F.3d at 107.

²² *Bunday*, 804 F.3d at 558.

²³ See *United States v. Schwartz*, 924 F.2d 410, 420 (2d Cir. 1991) (stating that the contemplation of harm requirement is satisfied if but-for defendants’ misrepresentations the victim would not have sold equipment to them); See also *United States v. Frank*, 156 F.3d 332, 335 (2d Cir. 1998) (evaluating how exposure to fines satisfies the contemplation of harm requirement).

²⁴ *Bunday*, 804 F.3d at 571.

²⁵ *Johnson*, 939 F.3d at 88.

²⁶ *Id.*

²⁷ *Id.*

i. Unexpected Economic Risks

In *Binday*, the Second Circuit upheld wire and mail fraud convictions of insurance brokers under the right to control theory where they made misrepresentations in policy applications that carried greater risk to the insurers than the insurers were aware of and had bargained for.²⁸ The *Binday* defendants submitted false information on insurance applications to conceal the fact that the applications were for “stranger-oriented life insurance” (“STOLI”) policies, which are policies on individuals owned by a third-party investor who bets that the value of the policy's benefits upon the individual's death would exceed the premiums.²⁹ The insurance company prohibited the issuance of STOLI policies directly, but allowed an insured to resell the policy to an investor after it was issued.³⁰ At trial, the defendants conceded that they submitted applications with false information, but argued that they did not intend to inflict--and the insurers did not suffer--any cognizable harm. They argued that their deceit caused no differences “between the benefits reasonably anticipated by the insurers and what they actually received because there was no meaningful economic difference between STOLI and non-STOLI policies.”³¹ This was particularly true, according to defendants, because after the insurer issues non-STOLI policies, they are freely transferable. However, the Second Circuit rejected this argument because witnesses testified that STOLI policies had different economic characteristics and an overall expectation of reduced profitability, which the insurers would have considered in the price had they known the applications were for STOLI policies.³² Thus defendants' misrepresentations “went to an essential element of the agreement because the insurers' belief that they were issuing non-STOLI policies significantly informed the insurers' financial expectations.”³³

United States v. Mittelstaedt provides a useful example of where a prosecution under the right to control was not upheld. The defendant was a consulting engineer for two Long Island communities that used his position to influence the town planning boards' decisions regarding real estate projects that he had an undisclosed interest in.³⁴ The defendant argued that the district court erred in refusing to give a proposed charge that the undisclosed information must have placed the Village at an economic disadvantage.³⁵ Essentially, the defendant maintained that such concealed interest must have induced “the Village to purchase the property at a higher cost than it would have otherwise paid.”³⁶ The government argued that whether the towns suffered economic loss made no difference, “because the loss of the right to control the expenditure of public funds, through the loss of the ability to make a fully informed decision, is sufficient to constitute mail fraud.”³⁷ The court disagreed with the Government and ruled that “where an individual standing in a fiduciary

²⁸ *Binday*, 804 F.3d at 558.

²⁹ *Id.* at 565.

³⁰ *Id.*

³¹ *Id.* at 568-69.

³² *Id.* at 573.

³³ *Id.* at 574.

³⁴ *United States v. Mittelstaedt*, 31 F.3d 1208, 1210 (2d Cir. 1994).

³⁵ *Id.* at 1216.

³⁶ *Id.*

³⁷ *Id.* at 1217.

relation to another conceals material information that the fiduciary is legally obliged to disclose, that non-disclosure does not give rise to mail fraud liability unless the omission can or does result in some tangible harm.”³⁸ Liability is determined only after the government demonstrates that the concealed information affects the ultimate value of the deal or has some form of independent value.³⁹ This requires that the government show more than just that the deprivation of information might have impacted where public money is spent to prove, because this lack of information does not constitute tangible harm under the mail fraud statute.⁴⁰ For a successful prosecution in this case, the government had to establish that the purpose of the omission was to cause “actual harm to the village of a pecuniary nature or that the village could have negotiated a better deal for itself if it had not been deceived.”⁴¹ Because the government failed to establish this, the jury instructions were found erroneous because they allowed for a conviction of fraud when no tangible harm was caused by the defendant’s omissions.⁴²

While slightly different from the traditional theory of fraud prosecutions, these examples show that the use of the right to control theory presents little controversy in some instances. This is because the injury, of unexpected economic risks, is directly tied to information that the defendant withholds from the defendant. In *Binday*, a right to control prosecution makes sense because what the victim insurers care about most is not necessarily the up-front payment on the life insurance policy, but rather the significant economic risk that STOLI policies expose them to compared to non-STOLI policies. The misrepresentations made by the defendants affect both the insurers’ decisions to issue policies and the probable value that they will receive from these policies. This behavior should be captured under the fraud statutes--and the right to control does this by allowing the economic differences between the two policies to be shown as an economic harm. On the other hand, *Mittelstaedt* shows that the right to control theory has its limits by requiring that the defendant’s misrepresentation be tied to a loss of economic or pecuniary value.

ii. Unclear Relation to Economic Value

While *Mittelstaedt* appears to properly restrict the use of the right to control theory, this has not been the case. The theory has applied in instances where it is not apparent that the defendant’s misrepresentations affected the economic value of the deal to the defendant. In these cases, the court seems to be doing a lot of work to square them with *Mittelstaedt* holding. In *Dinome*, the defendant falsely stated his income to a bank to obtain a mortgage.⁴³ After being convicted of mail and wire fraud, the defendant argued on appeal that the jury instruction was at odds with *Mittelstaedt* because the instruction only stated that “the definition of property includes intangible property interests such as the right to control the use of one’s own assets. This interest is injured when a person is deprived of information he would consider valuable in deciding how

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1218.

⁴³ *United States v. Dinome*, 86 F.3d 277 (2d Cir. 1996).

to use his assets.”⁴⁴ Despite the court’s recognition that this instruction was at odds with *Mittelstaedt*, it still upheld the instructions because the information withheld by the defendant significantly diminished the ultimate value of the mortgage to the bank.⁴⁵ While the outcome in *Dinome* is defensible because of the effect that the misrepresentation has on the value of the mortgage, it is part of a stream of decisions that has expanded the scope of the right to control in ways that many deem troublesome.⁴⁶ But the theory’s validity is not just being debated in law reviews. The federal circuits are divided on whether the theory is valid.

C. Circuit Split

While the Second Circuit was the birthplace of the theory, there has been a mixed reaction to the right to control theory among other circuits. Some circuits agree with the Second Circuit’s views on the theory, some disagree, and some have issued decisions that go both ways. The Eighth Circuit has upheld the right to control theory as valid, “We determine that the right to control spending constitutes a property right. This position draws support from the Supreme Court’s statement in *McNally* that there the jury instructions were flawed because the jury was not ‘charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent.’”⁴⁷ The Tenth Circuit has similarly found that an intangible right to control in the fraud statutes, “[W]e have recognized the intangible right to control one’s property is a property interest within the purview of the mail and wire fraud statutes.”⁴⁸ The Fourth Circuit also agrees with the Second Circuit, “The Government need not prove that the victim suffered a monetary loss as a result of the alleged fraud; it is sufficient that the victim was deprived of some right over its property.”⁴⁹

However, there are several circuits that disagree with the Second Circuit’s views on the right to control theory. The Sixth Circuit is one of these circuits, “[The] right to control” is “not the kind of ‘property’ right safeguarded by the fraud statutes”; the fraud statute “is ‘limited in scope to the protection of property rights,’ and the ethereal right to accurate information doesn’t fit that description.” (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)).⁵⁰ The Ninth Circuit has also found that the right to control is not property under the fraud statutes, “the interest of the [victim] manufacturers in seeing that the products they sold were not shipped to the Soviet

⁴⁴ *Id.* at 284

⁴⁵ *Id.*

⁴⁶ *United States v. Viloski*, 557 Fed.Appx. 28, 34 (2d Cir. 2014) (summary order) (upholding a right to control prosecution because defendant’s kickbacks prevented the victim from obtaining a better deal for itself); *United States v. Johnson*, 945 F.3d 606 (2d Cir. 2019) (permitting a right to control prosecution because the defendant’s misrepresentations about style of doing the deal affected the price of the exchange); *United States v. Gatto*, 986 F.3d 104 (2d Cir. 2021) (allowing a right to control prosecution because bribes could have exposed victims to penalties); see generally Tai H. Park, *The “Right to Control” Theory of Fraud: When Deception Without Harm Becomes A Crime*, 43 Cardozo L. Rev. 135, 165 (2021).

⁴⁷ *United States v. Shyres*, 898 F.2d 647, 652 (8th Cir. 1990).

⁴⁸ *United States v. Welch*, 327 F.3d 1081, 1108 (10th Cir. 2003).

⁴⁹ *United States v. Gray*, 405 F.3d 227, 234 (4th Cir. 2005).

⁵⁰ *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014).

Bloc in violation of federal law is not ‘property’ of the kind that Congress intended to reach in the wire fraud statute.”⁵¹

Lastly, both the Seventh and Third Circuits have issued decisions that both agree and disagree with the Second Circuit’s view on the right to control theory. The Seventh Circuit has recognized the victim’s “right to control its risk of loss.”⁵² However, the court has found that a university’s “right to control” who receives scholarships is not a cognizable property right under the fraud statutes: “[A] university that loses the benefits of [the] amateurism [of an athlete] ... has been deprived only of an intangible right” not cognizable under the fraud statutes.⁵³ The Third Circuit has also issued contradictory opinions on the theory. In one case, the court contrasted “[p]urely intangible rights” with “rights in intangibles which nevertheless constitute ‘property.’”⁵⁴ However, the court later affirmed that under the mail and wire fraud statutes, property rights do not need to be tangible and can include intangible forms of property.⁵⁵ Lastly, the court has distinguished *Zauber* by stating that the deprivation of property in question related to the “right to exclusive use of [the] property,” rather than the right to control its property in a manner different than the defendant.⁵⁶

V. What the Court Must Consider

The Court must consider several factors when they decide the right to control theory’s fate this summer. This includes the potential for overcriminalization, whether the right to control is a form of property, and the potential impact of limiting the theory. Each of these factors are explored below.

A. The Potential for Overcriminalization

While the theory has been subject to many criticisms, two of the biggest arguments concern the implications that the theory has on criminal justice: that it captures behavior that it should not and that it does not provide potential defendants with notice. Some argue that this case is an example of overcriminalization wherein prosecutors and lower courts are to blame for their expansive definitions of the criminal statutes.⁵⁷ These critics argue that intangible rights were never intended to be covered by Congress through the fraud statutes.⁵⁸ The main issue here is that through broad interpretations of the statute, prosecutors can impose their own beliefs and values

⁵¹ *United States v. Bruchhausen*, 977 F.2d 464, 468 (9th Cir. 1992).

⁵² *United States v. Catalfo*, 64 F.3d 1070, 1077 (7th Cir. 1995).

⁵³ *United States v. Walters*, 997 F.2d 1219, 1226 (7th Cir. 1993).

⁵⁴ *United States v. Zauber*, 857 F.2d 137, 142 (3d Cir. 1988).

⁵⁵ *United States v. Henry*, 29 F.3d 112, 113-14 (3d Cir. 1994).

⁵⁶ *United States v. Al Hedaithy*, 392 F.3d 580, 603 (3d Cir. 2004).

⁵⁷ See Brief for Law Professors as Amicus Curiae at 16, *Ciminelli v. United States*, 142 S.Ct. 2901 (2022) [hereinafter *Law Professors*] (blaming prosecutors for the perpetuation of unfair criminal cases); see also Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, 548 (2012) (describing how prosecutors make up their own notions of fraud).

⁵⁸ Smith, *supra* note 57, at 550-53.

on citizens who engage in unsavory behavior.⁵⁹ This leads to a second criticism against the right to control, and prosecutions for other intangible rights: lack of notice. Since prosecutors have used the fraud statutes in this way, it prevents the public from being on notice for what behaviors are a violation of the law.⁶⁰

These arguments are persuasive as this prevents citizens from making informed decisions about how to conduct business dealings. There are many instances where defendants have been prosecuted for actions that they believed were within the bounds of the law. Moreover, the Second Circuit's allowance that the fraudulent intent element can be satisfied by showing that the defendant's actions exposed the victim to possible economic harm seems particularly unreasonable. While not true in every instance, exposing a counterparty to some economic risk is a natural part of doing business. Some may argue that this deters criminal behavior and encourages potential white-collar criminals to be especially careful in their negotiations, but the theory in its current form is too divergent to provide proper notice to deter these actors.⁶¹ Thus, the dangers of overcriminalization will only be improved through a clarification of the right to control in *Ciminelli*.

B. Is the Right to Control a Form of Property?

To clarify the right to control, the Supreme Court must answer whether it is a form of property itself or whether it is incidental to property ownership. Much of the tension surrounding the right to control is focused on this question. If it is considered to be property, then fraud prosecutions under the theory would be valid. However, if the right to control is merely an incident of property ownership it would not so clearly fit within the fraud statute's definition of property. The Second Circuit has issued decisions that have gone both ways. The circuit has justified this doctrine by emphasizing that a defining feature of most property is the right to control the asset in question.⁶² But in *United States v. Percoco*, the court said that the prosecution can satisfy the money or property element by showing that the defendant, "through the withholding or inaccurate reporting of information that could impact on economic decisions, deprived some person or entity of potentially valuable information."⁶³ Thus, one's property interests are harmed when a scheme denies him or her the right to control his or her assets by depriving him or her of information necessary to make discretionary economic decisions. This seems to apply equally to tangible and intangible assets, as the Second Circuit explained that previous cases "did not limit the scope of § 1341 to tangible as distinguished from intangible property rights."⁶⁴ Thus, in some right to control prosecutions, the intangible property at issue is potentially valuable economic information and its

⁵⁹ Law Professors, *supra* note 57, at 17.

⁶⁰ Park, *supra* note 46, at 196.

⁶¹ *Id.*

⁶² *United States v. Lebedev*, 932 F.3d 40, 48 (2d Cir. 2019) (internal quotation marks and alteration omitted), *cert. denied sub nom. Gross v. United States*, — U.S. —, 140 S. Ct. 1224, 206 L.Ed.2d 219 (2020).

⁶³ *United States v. Percoco*, 13 F.4th 158, 170 (2d Cir. 2021), *cert. granted sub nom. Ciminelli v. United States*, 213 L. Ed. 2d 1114, 142 S. Ct. 2901 (2022).

⁶⁴ *Carpenter v. United States*, 484 U.S. 19, 25 (1987).

resulting effect on the control of assets; but in some cases the right to control is merely a way of getting to the tangible property rights at issue. This inconsistency has contributed significantly to the currently confused state of the doctrine.

Ciminelli offers a convincing argument for how the right to control has been improperly considered by the Second Circuit and why it should not be classified as property under the fraud statutes. Ciminelli argues that the right to control wrongly “allows for conviction on a showing that the defendant, through the withholding or inaccurate reporting of information that could impact on economic decisions, deprived some person or entity of potentially valuable economic information.”⁶⁵ Ciminelli further claims that Second Circuit decisions have been inconsistent at best and that the conception of the right to control as a property right is at odds with traditional conceptions of property rights.⁶⁶ Since no traditional property interest is infringed by the withholding of complete and accurate economic information and because no right is deprived solely by withholding information, the right to control theory fails to state a traditional property fraud.⁶⁷ This is a view that has garnered support among those discussing this issue.⁶⁸

Ciminelli, and his supporters, make a much more convincing argument than the Second Circuit. As an intangible asset, the right to control does not seem to fit into the conception of property that Congress considered in the fraud statutes. In a recent case about government impropriety, the Supreme Court has found that these statutes “do not proscribe schemes to defraud citizens of their intangible rights to honest and impartial government. . . . they bar only schemes for obtaining property.”⁶⁹ This suggests that the Court is open to the idea that intangible rights, such as the right to control one’s economic information, does not satisfy the property requirement under the fraud statutes and any prosecution that treats it as such would be improper. Prosecutors who wish to continue using the theory may hope that the court recognizes the right to control as an independent property right; but their hope would be misplaced. At the briefing and oral argument stages of *Ciminelli*, the government completely abandoned the theory and conceded that the Second Circuit erred in its reading of the property element.⁷⁰ This foreshadows the likelihood that the Supreme Court will dramatically limit the theory in a way that eliminates the possibility that the right to control may satisfy the property element of the fraud statutes.

C. Potential Impact of Limiting the Theory

Even though a limit to theory would provide needed clarity and notice for defendants, this does not mean that all problems would be solved. A significant impact will be felt in cases where

⁶⁵ Brief for Petitioner at 15, *Ciminelli v. United States*, 142 S.Ct 2901 (2022) (No. 21-1170) [hereinafter *Petitioner’s Brief*].

⁶⁶ *See id.* (discussing how making informed economic decisions about one’s assets was not included in common-law meanings of property).

⁶⁷ *Id.*

⁶⁸ *See Park*, *supra* note 34, at 174 (arguing that the right to control distorts the meaning of property); *see also* Law Professors’ *supra* note 57, at 12 (insisting that the right to control is inconsistent with Supreme Court precedent and common law conceptions of property).

⁶⁹ *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020).

⁷⁰ Transcript of Oral Argument at 34, *Ciminelli v. United States*, 142 S.Ct 2901 (2022) (No. 21-1170).

the information that the defendant misrepresented is valuable to the victim for a reason other than its expected economic impact. Race and identity-conscious government contracting programs are an example of this, as prosecutors routinely rest successful fraud prosecutions on the right to control theory in these cases.⁷¹ The Department of Transportation's Disadvantaged Business Enterprise Program ("DBE"), aims to increase the number of minority and economically disadvantaged individuals who participate in construction projects that receive federal funding.⁷² In this scenario, imagine that the defendant lies about their status as a minority or economically disadvantaged individual to win a construction project bid. This is different from the *Binday* and *Mittelstaedt* cases, because the government receives what it contracted for and there is no exposure to economic harm. However, the defendant's misrepresentation would be deemed material under the right to control, as articulated by the Second Circuit, because the government may not have selected it for the job if it knew otherwise. *U.S. v. Pfeiffer*, currently pending, concerns this very issue.⁷³ Prosecutors charged mail and wire fraud, accusing Pfeiffer and Colton of using Colton's business, to secure for Pfeiffer's company \$15.5 million in government contracts that it would otherwise have been unable to obtain because Colton's business was fraudulently qualified as a DBE. Prosecutors allege that there was no "commercially useful function" that Colton's business served.⁷⁴ The defendants filed a motion to dismiss arguing that the right to control cannot be applied because their misrepresentation bore no impact on the economic decision making of the government.⁷⁵ However, the District Court judge has delayed ruling on the defendant's motion to dismiss because of the Supreme Court's pending decisions in *Ciminelli*. If the Supreme Court does indeed limit the theory, defendants like Pfeiffer and Colton will be able to avoid prosecutions for their non-economic considerations. Prosecutors will likely criticize this, but the federal criminal justice system is not the answer for all unsavory behavior. Better solutions exist. One potential solution is to let Congress decide how to address this behavior. The same can be said for state legislatures. This may be an unsatisfactory answer, but it is the solution that is most likely to ensure fairness in the enforcement of fraud prosecutions.

VI. Conclusion

The right to control should not be completely eliminated. It is an important tool that enables prosecutors to address a number of cases that would be much more difficult to prosecute otherwise. However, the theory will undoubtedly be altered as the government abandoned it completely at oral arguments in the Supreme Court. The only question is how much. While there are valid applications of the theory that should not be upset, the Court must find a way to limit the theory without endangering the ability of prosecutors to bring cases against those that make

⁷¹ *Id.* at 32.

⁷² Disadvantaged Business Enterprise (DBE) Program, DEP'T OF TRANSP. (Nov. 25, 2022), <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise>.

⁷³ Text Order, *United States v. Pfeiffer*, No. 1:16-cr-00023-RJA-MJR-2 (W.D.N.Y. July 28, 2022), ECF No. 162.

⁷⁴ *Id.*

⁷⁵ *Id.*

misrepresentations in cases like *Pfeiffer* discussed above. One way that the Court can do this is by using the limit imposed in *Mittelstaedt*: if the misrepresentation does not relate to *economic* harm, then a right to control prosecution is not possible. Critics would likely say that this does not go far enough, and that the Court should determine that the right to control is not a form of property that sustains any fraud prosecution. The problem with this is that it would likely eliminate the possibility of justifiable prosecutions in cases like *Binday* and *Dinome*. Whatever choice the Court makes, it will be worth monitoring how it implicates cases where defendants lie about their veteran status, identity, race, or other important, but non-economic, characteristics that may be important to the victim.

Applicant Details

First Name	Andrew
Last Name	Morales
Citizenship Status	U. S. Citizen
Email Address	morales.a24@law.wlu.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>309 S Main St Apt #9</div> <div>City</div> <div>Lexington</div> <div>State/Territory</div> <div>Virginia</div> <div>Zip</div> <div>24450</div> </div> </div>
Contact Phone Number	918-625-7069

Applicant Education

BA/BS From	Westminster College
Date of BA/BS	May 2020
JD/LLB From	Washington and Lee University School of Law
	http://www.law.wlu.edu
Date of JD/LLB	May 10, 2024
Class Rank	50%
Does the law school have a Law Review/Journal?	Yes
Law Review/Journal	No
Moot Court Experience	Yes
Moot Court Name(s)	National Environmental Law Moot Court Competition Robert J. Grey, Jr. Negotiations Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **Yes**
Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Peppers, Todd
pepperst@wlu.edu
Belmont, Elizabeth
belmontb@wlu.edu
Fraley, Jill
fraleyj@wlu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Andrew Morales
309 South Main Street, Apt. 9
Lexington, VA 24450

June 19, 2023

The Honorable Jamar K. Walker
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year student at Washington and Lee University School of Law. I am writing to apply for a 2024–2025 term clerkship in your chambers.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. The writing sample is a brief in support of a motion for summary judgment that I prepared for my Civil Litigation Practicum this past semester. Also enclosed are letters of recommendation from Professors Todd Peppers (540.761.3988), Beth Belmont (540.460.3421), and Jill Fraley (859.321.6242).

If there is any other information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Andrew Morales

ANDREW C. MORALES

309 South Main Street Apartment #9 | Lexington, VA 24450 | 918.625.7069 | morales.a24@law.wlu.edu

EDUCATION

Washington and Lee University School of Law, Lexington, VA

J.D. Candidate, May 2024

Academics: GPA (cumulative): 3.525 (Top 40%); GPA (2L): 3.821; Highest Grade in Evidence

Activities: Finalist, Robert J. Grey, Jr. Negotiations Competition
National Environmental Law Moot Court Competition Team
Latin American Law Student Association (LALSA)

3L Externship: Chambers of U.S. District Judge Robert S. Ballou

Research: Assistant to Professor Todd C. Peppers (research on Chief Justice Warren Burger)

Westminster College, Fulton, MO

B.A., Biochemistry and Philosophy, May 2020

Honors: Alpha Chi Honor Society (Initiated as Top 5% of Junior Class)

Activities: Undergraduate Scholars Forum, Physiology and Biochemistry Research
Westminster Seminar Mentor (Selected by Organic Chemistry Professor)
WestMo Tutors (Selected by Professor), Tutor for Statistics and Calculus I
President of Pre-Healthcare Professionals Association
Freshman Vice President of Student Government Association
Student Ambassador

EXPERIENCE

Huff, Powell & Bailey, LLC, Atlanta, GA

Summer Associate, May – August 2023

Baum, Glass, Jayne, Carwile & Peters, PLLC, Tulsa, OK

Summer Associate, June – August 2022

Worked in trial and appellate practice areas of complex commercial litigation, insurance defense, and energy law. Conducted legal research, wrote memorandums on critical legal questions, and attended depositions.

Secrest, Hill, Butler & Secrest, PC, Tulsa, OK

Summer Associate, May – June 2022

Worked in trial and appellate practice areas of products liability defense, premises liability defense, and medical malpractice defense. Conducted legal research, drafted dispositive motions and support briefs, wrote memorandums on critical legal questions, attended depositions and wrote deposition summaries, conducted opposition research on plaintiffs' expert witnesses for cross-examination, and attended hearings.

Janine Billings State Farm Agency, Tulsa, OK

Office Manager, Marketing, Customer Service, January – July 2021

Executed leadership role in general management during absence of agent. Managed payroll and banking, analyzed and delegated primary client concerns, and revamped marketing strategy via social media.

Lululemon, Tulsa, OK

Educator, August – February 2020

Greeted and appraised guest needs, remedied past product concerns, and educated guests on product details.

INTERESTS

Running, Weightlifting, Pick-Up Basketball

Philosophy of Mind, Russian Literature, Finding the Best Burger in Town

Print Date: 06/10/2023

Page: 1 of 2

Student: Andrew Christian Morales

WASHINGTON AND LEE
UNIVERSITY

Lexington, Virginia 24450-2116



SSN: XXX-XX-4703

Entry Date: 08/30/2021

Date of Birth: 04/10/XXXX

Academic Level: Law

2021-2022 Law Fall

08/30/2021 - 12/18/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 109	CIVIL PROCEDURE	B+	4.00	4.00	13.32	
LAW 140	CONTRACTS	B+	4.00	4.00	13.32	
LAW 163	LEGAL RESEARCH	B+	0.50	0.50	1.67	
LAW 165	LEGAL WRITING I	B	2.00	2.00	6.00	
LAW 190	TORTS	B	4.00	4.00	12.00	

Term GPA: 3.193

Totals:

14.50 14.50 46.31

Cumulative GPA: 3.193

Totals:

14.50 14.50 46.31

2021-2022 Law Spring

01/10/2022 - 04/29/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 130	CONSTITUTIONAL LAW	A-	4.00	4.00	14.68	
LAW 150	CRIMINAL LAW	B-	3.00	3.00	8.01	
LAW 163	LEGAL RESEARCH	B+	0.50	0.50	1.67	
LAW 166	LEGAL WRITING II	B	2.00	2.00	6.00	
LAW 179	PROPERTY	B+	4.00	4.00	13.32	
LAW 195	TRANSNATIONAL LAW	A-	3.00	3.00	11.01	

Term GPA: 3.314

Totals:

16.50 16.50 54.68

Cumulative GPA: 3.257

Totals:

31.00 31.00 100.99

2022-2023 Law Fall

08/29/2022 - 12/19/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 642	Law and Geography Seminar	A-	2.00	2.00	7.34	
LAW 685	Evidence	A	3.00	3.00	12.00	
LAW 743	Healthcare Law	A	3.00	3.00	12.00	
LAW 775	Environmental Law	A	3.00	3.00	12.00	
LAW 865	Negotiations and Conflict Resolution Practicum	A-	2.00	2.00	7.34	

Term GPA: 3.898

Totals:

13.00 13.00 50.68

Cumulative GPA: 3.447

Totals:

44.00 44.00 151.67

Print Date: 06/10/2023

Page: 2 of 2

Student: Andrew Christian Morales

WASHINGTON AND LEE
UNIVERSITY

Lexington, Virginia 24450-2116



2022-2023 Law Spring

01/09/2023 - 04/28/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 690	Professional Responsibility	A-	3.00	3.00	11.01	
LAW 716	Business Associations	B+	4.00	4.00	13.32	
LAW 725	Conflict of Laws	A	3.00	3.00	12.00	
LAW 829	Civil Litigation Practicum	A	5.00	5.00	20.00	

Term GPA: 3.755

Totals:

15.00

15.00

56.33

Cumulative GPA: 3.525

Totals:

59.00

59.00

208.00

2023-2024 Law Fall

08/28/2023 - 12/18/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 700	Federal Jurisdiction and Procedure		3.00	0.00	0.00	
LAW 707L	Skills Immersion: Litigation		2.00	0.00	0.00	
LAW 713	Sales		3.00	0.00	0.00	
LAW 811	Appellate Advocacy Practicum		4.00	0.00	0.00	
LAW 934	Federal Judicial Externship		2.00	0.00	0.00	
LAW 934FP	Federal Judicial Externship: Field Placement		2.00	0.00	0.00	

Term GPA: 0.000

Totals:

16.00

0.00

0.00

Cumulative GPA: 3.525

Totals:

59.00

59.00

208.00

Law Totals	Credit Att	Credit Earn	Cumulative GPA
Washington & Lee:	59.00	59.00	3.525
External:	0.00	0.00	
Overall:	59.00	59.00	3.525

Program: Law

End of Official Transcript

WASHINGTON AND LEE UNIVERSITY TRANSCRIPT KEY

Founded in 1749 as Augusta Academy, the University has been named, successively, Liberty Hall (1776), Liberty Hall Academy (1782), Washington Academy (1796), Washington College (1813), and The Washington and Lee University (1871). W&L has enjoyed continual accreditation by or membership in the following since the indicated year: The Commission on Colleges of the Southern Association of Colleges and Schools (1895); the Association of American Law Schools (1920); the American Bar Association Council on Legal Education (1923); the Association to Advance Collegiate Schools of Business (1927); the American Chemical Society (1941); the Accrediting Council for Education in Journalism and Mass Communications (1948), and Teacher Education Accreditation Council (2012).

The **basic unit of credit** for the College, the Williams School of Commerce, Economics and Politics, and the School of Law is equivalent to a semester hour.

The **undergraduate calendar** consists of three terms. From 1970-2009: 12 weeks, 12 weeks, and 6 weeks of instructional time, plus exams, from September to June. From 2009 to present: 12 weeks, 12 weeks, and 4 weeks, September to May.

The **law school calendar** consists of two 14-week semesters beginning in August and ending in May.

Official transcripts, printed on blue and white safety paper and bearing the University seal and the University Registrar's signature, are sent directly to individuals, schools or organizations upon the written request of the student or alumnus/a. Those issued directly to the individual involved are stamped "Issued to Student" in red ink. ***In accordance with The Family Educational Rights and Privacy Act of 1974, as amended, the information in this transcript is released on the condition that you permit no third-party access to it without the written consent from the individual whose record it is. If you cannot comply, please return this record.***

Undergraduate

Degrees awarded: Bachelor of Arts in the College (BA); Bachelor of Arts in the Williams School of Commerce, Economics and Politics (BAC); Bachelor of Science (BS); Bachelor of Science with Special Attainments in Commerce (BSC); and Bachelor of Science with Special Attainments in Chemistry (BCH).

Grade	Points	Description
A+	4.00	Superior.
A	4.00	
A-	3.67	
B+	3.33	Good.
B	3.00	
B-	2.67	
C+	2.33	Fair.
C	2.00	
C-	1.67	
D+	1.33	Marginal.
D	1.00	
D-	0.67	
E	0.00	Conditional failure. Assigned when the student's class average is passing and the final examination grade is F. Equivalent to F in all calculations
F	0.00	Unconditional failure.

Grades not used in calculations:

I	-	Incomplete. Work of the course not completed or final examination deferred for causes beyond the reasonable control of the student.
P	-	Pass. Completion of course taken Pass/Fail with grade of D- or higher.
S, U	-	Satisfactory/Unsatisfactory.
WIP	-	Work-in-Progress.
W, WP, WF	-	Withdrew, Withdrew Passing, Withdrew Failing. Indicate the student's work up to the time the course was dropped or the student withdrew.

Grade prefixes:

R	Indicates an undergraduate course subsequently repeated at W&L (e.g. RC-).
E	Indicates removal of conditional failure (e.g. ED = D). The grade is used in term and cumulative calculations as defined above.

Ungraded credit:

Advanced Placement: includes Advanced Placement Program, International Baccalaureate and departmental advanced standing credits.

Transfer Credit: credit taken elsewhere while not a W&L student or during approved study off campus.

Cumulative Adjustments:

Partial degree credit: Through 2003, students with two or more entrance units in a language received reduced degree credit when enrolled in elementary sequences of that language.

Dean's List: Full-time students with a fall or winter term GPA of at least 3.400 and a cumulative GPA of at least 2.000 and no individual grade below C (2.0). Prior to Fall 1995, the term GPA standard was 3.000.

Honor Roll: Full-time students with a fall or winter term GPA of 3.750. Prior to Fall 1995, the term GPA standard was 3.500.

University Scholars: This special academic program (1985-2012) consisted of one required special seminar each in the humanities, natural sciences and social sciences; and a thesis. All courses and thesis work contributed fully to degree requirements.

Law

Degrees awarded: Juris Doctor (JD) and Master of Laws (LLM)

Numerical	Letter	Grade*	Grade**	Points	Description
4.0	A			4.00	
	A-			3.67	
3.5				3.50	
	B+			3.33	
3.0	B			3.00	
	B-			2.67	
2.5				2.50	
	C+			2.33	
2.0	C			2.00	
	C-			1.67	
1.5				1.50	This grade eliminated after Class of 1990.
	D+			1.33	
1.0	D			1.00	A grade of D or higher in each required course is necessary for graduation.
	D-			0.67	Receipt of D- or F in a required course mandates repeating the course.
0.5				0.50	This grade eliminated after the Class of 1990.
0.0	F			0.00	Receipt of D- or F in a required course mandates repeating the course.

Grades not used in calculations:

-	WIP	-	Work-in-progress. Two-semester course.
I	I	-	Incomplete.
CR	CR	-	Credit-only activity.
P	P	-	Pass. Completion of graded course taken Pass/Not Passing with grade of 2.0 or C or higher. Completion of Pass/Not Passing course or Honors/Pass/Not Passing course with passing grade.
-	H	-	Honors. Top 20% in Honors/Pass/Not Passing courses.
F	-	-	Fail. Given for grade below 2.0 in graded course taken Pass/Fail.
-	NP	-	Not Passing. Given for grade below C in graded course taken Pass/Not Passing. Given for non-passing grade in Pass/Not Passing course or Honors/Pass/Not Passing course.

* Numerical grades given in all courses until Spring 1997 and given in upperclass courses for the Classes of 1998 and 1999 during the 1997-98 academic year.

** Letter grades given to the Class of 2000 beginning Fall 1997 and for all courses beginning Fall 1998.

Cumulative Adjustments:

Law transfer credits - Student's grade-point average is adjusted to reflect prior work at another institution after completing the first year of study at W&L.

Course Numbering Update: Effective Fall 2022, the Law course numbering scheme went from 100-400 level to 500-800 level.

Office of the University Registrar
Washington and Lee University
Lexington, Virginia 24450-2116
phone: 540.458.8455
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University Registrar



WASHINGTON AND LEE
UNIVERSITY
SCHOOL OF LAW

TODD C. PEPPERS
VISITING PROFESSOR OF LAW

Telephone: (540) 458-8522
Facsimile: (540) 458-8488
E-mail: pepperst@wlu.edu

June 10, 2023

To Whom It May Concern:

I am writing this letter in support of Andrew Morales' clerkship application. For the reasons listed below, I think that Andrew would be a wonderful addition to your chambers. I recommend his application to you enthusiastically and without reservation.

Before I address Andrew's skill set, I want to briefly talk about my insights into legal clerkships. I had the great good fortune to clerk after law school – first for a federal district court judge and then a federal magistrate court judge. The clerkship experience so interested me that I subsequently wrote my graduate school dissertation on the subject. And since taking a teaching position in 2002, I have written, co-written, edited and/or co-edited four books and approximately twenty articles on law clerks. This includes two articles which surveyed federal appeals court and district court judges on their law clerk hiring and utilization practices.

The end result of this research is that I have a fairly accurate idea of what judges generally want in a law clerk as well as the skills needed to be a successful clerk. Of course, at a minimum, judges want to hire bright young people who have succeeded in law school. Candidates with a strong work ethic, maturity and solid research/writing skills are preferred. And, of course, "chamber fit" is important. Andrew checks off all these boxes.

Last semester, I had Andrew as a student in my Civil Litigation Practicum. The course is a semester-long simulation of a toxic tort case, in which students are divided into teams of attorneys to represent the different parties in the litigation. The students draft discovery requests, take depositions, and argue summary judgment motions. The simulation is based on a case that I once litigated, and it's a fairly complex and accurate representation of a wrongful death action (asbestos) combined with a loss of consortium claim.

Andrew was assigned to represent an insulation contractor and supplier. The simulation introduced a "wrinkle" into defending his client because our hypothetical state has a statute of repose defense in addition to the traditional issues/defenses in a negligent design/failure to warn case. I've been teaching this simulation for the last decade, and Andrew – *hands down* – did the best job of any student assigned to represent this specific defendant. This was especially true when it came to developing the statute of response defense, which students often struggle to even understand. And the summary judgment brief that he drafted was on par with the work product of a second or third year associate.

In light of Andrew's hard work, in May I asked him to work as my research assistant. I am in the early stages of working on a biography of Chief Justice Warren Burger, which includes doing archival work in the Burger archives at William and Mary. This summer, Andrew is doing remote research for me while he works in Atlanta. My plan is to have him help me dig through the extensive archives when he returns to Virginia this fall. This is important and complicated research, and the fact that I've asked Andrew to be my assistant is evidence of my high regard for his intellect and work ethic.

Finally, there is chamber fit. I think the world of Andrew. He is a friendly, personable, and articulate young man with a perpetual twinkle in his eye. While Andrew takes his studies seriously, he doesn't take *himself* too seriously (a common vice of law students) and has a good sense of humor. He will mesh easily with your existing chamber staff and become a great addition to your "family" of law clerks.

Justice Felix Frankfurter had an expression that he used when speaking of his best law clerks. "I bet on him," Frankfurter would say. Well, I bet on Andrew. And your bet on Andrew will pay dividends.

Please let me know if there is any additional information that I can provide. I can be reached at pepperst@wlu.edu or at (540) 761-3988.

Most sincerely yours,

A handwritten signature in black ink, appearing to read "Todd C. Peppers". The signature is fluid and cursive, with a large initial "T" and "P".

Todd C. Peppers

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 19, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am on the faculty at Washington and Lee University School of Law, and am writing to you in very enthusiastic support of Andrew C. Morales, a rising third year law student at W&L who is seeking a clerkship with your court.

Mr. Morales was enrolled in my Fall 2022 Evidence class. In a course that was full of remarkable students, Mr. Morales was the very top performing student on both his final exam and his other required written work (two motions in limine), by a quite significant margin. Moreover, my Evidence class had only 43 students, so over the course of our term together I was able to get to know Mr. Morales rather well. As I explain more fully below, based on my experience with Mr. Morales in class and outside of class, I am confident that he will be an asset to any court that has the pleasure of working with him in its chambers.

I teach my Evidence course with an experiential bent. To that end, in addition to requiring extensive case readings, deep engagement with the rules, and a cumulative multiple-choice final exam, I employ a problem-based approach that demands significant in-class discussion. I also require the students to draft and argue two complex motions in limine involving issues arising under Federal Rules of Evidence 401-404 and 702-703. As a consequence, I am able to develop deeper insights into my Evidence students' strengths and weaknesses than is perhaps typical of a traditional law school classroom.

Over the course of the term, I discovered that, while Mr. Morales has a warm, steady, low-key demeanor, he is absolutely not a wallflower. He was an active and incisive participant in what was a very smart and lively class overall. His in-class work and our out-of-class discussions demonstrated that he is an inquisitive, thorough, creative thinker, and that he is a close reader with very strong analytical skills. Mr. Morales also performed extremely well in his motion in limine oral arguments. He has excellent communication skills, and during his oral arguments he was poised, self-assured, clear and creative. He also did an excellent job engaging with me (as the court) when I pressed him with difficult questions.

Mr. Morales's written work on his two motions in limine was also superb – the strongest in the entire class. Both of his motions made excellent use of the applicable authority, and both were cogent, creative, well-organized, well-argued, and thorough without sacrificing conciseness. Based on my experience with his work, I am confident that Mr. Morales's writing and analytical skills would serve you well in your chambers.

I am also confident that you will find Mr. Morales to be a wonderful colleague. He is truly a delight to be around – he is kind-hearted, collaborative, bright and hard-working. He was a pleasure to teach and work with, and I am confident that he will bring much to your chambers.

I would welcome the opportunity to talk with you regarding Mr. Morales, and I encourage you to contact me with any questions you may have.

Very truly yours,

C. Elizabeth Belmont
Clinical Professor of Law

Elizabeth Belmont - belmontb@wlu.edu

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 19, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I have known Andrew since his 1L year of Law School. He was a member of my Constitutional Law course, as well as two other courses including a small seminar course. I know Andrew well, having worked with him in multiple contexts during his time at law school. I have observed his constant quest for knowledge and dedication to his work and I am delighted to recommend him for a clerkship.

I have taught Andrew in very different courses: the first year constitutional law course, a very statutory-focused environmental law course, and a seminar called Law and Geography, which I consider to be essentially a super advanced writing course. Each of these courses presents different challenges to a law student from comprehending complex theories of governance to parsing statutes to writing a Supreme Court amicus brief. Andrew performed very well in each of those contexts. In the context of peer critiques, he was both honest and kind. He had the patience and curiosity to really engage with the coursework. He showed both fascination with and commitment to developing good arguments and mastering advanced legal writing skills.

More personally, Andrew is engaging, mature and very professional. He is enthusiastic about the study and practice of law and soaks up every opportunity provided to him. He presents himself in a measured, thoughtful way when speaking and unsurprisingly given that, he is meticulous in his writing. I believe that he would greatly value a clerkship experience and that he would thrive in that type of environment. Most importantly for the work of the court, given Andrew's abilities and his work ethic, I know that he would be a valuable contributor to chambers.

Best Regards,

Jill M. Fraley
Professor of Law

Jill Fraley - fraleyj@wlu.edu

WRITING SAMPLE

Andrew C. Morales
309 S. Main St., Apartment #9
Lexington, VA 24450
Morales.a24@law.wlu.edu
(918)-625-7069

During a Civil Litigation Practicum that I enrolled in for the Spring 2023 semester, I prepared the attached brief in support of Defendant AC&S, Inc.'s motion for summary judgment. The practicum consisted of a simulated asbestos lawsuit, which was based on a real case that Professor Todd C. Peppers litigated during his tenure with an Atlanta law firm in 2001-2002. Each party to the simulation had a document repository to simulate discovery, and depositions of fake witnesses were taken with a court reporter at the law school. After developing an evidentiary record, the practicum culminated in a summary judgment hearing, as to which the attached brief was submitted for. You will notice that we were instructed to make *in limine* arguments in the footnotes as opposed to writing a separate motion.

IN THE CIRCUIT COURT
FOR THE SOUTHERN DISTRICT OF BLACKACRE

DAVID COSTELOE, Individually and as)	
Personal Representative of the Heirs and)	
Estate of NANCY W. COSTELOE,)	
Deceased,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 08CV1765
)	
AC&S, INC.,)	
JOHNS-MANVILLE, INC.,)	
NATIONAL GYPSUM,)	
PITTSBURGH-CORNING, INC.,)	
TIGHT FIT GASKETS & PACKING, AND)	
UNITED STATES GYPSUM,)	
)	
Defendants.)	

**DEFENDANT AC&S, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendant AC&S, Inc. [hereinafter “AC&S”] and files this Memorandum of Law in Support of its Motion for Summary Judgment as to Plaintiff David Costeloe [hereinafter “Plaintiff”], Individually and as Personal Representative of the Heirs and Estate of Nancy W. Costeloe [hereinafter “Nancy”], Deceased, by showing the Court as follows:

I. INTRODUCTION

Nancy was born in 1954 and lived with her family in a series of Chattanooga, Blackacre homes until 1972. Between 1954 and 1972, Plaintiff alleges that Nancy’s father, Bill Webbe, worked with or around asbestos-containing products while he was employed at DuPont-Chattanooga as well as during the several occasions that he built homes on the side. Plaintiff further alleges that Nancy was exposed to asbestos by and through her father, either as a result of exposure

to dust from doing the family's laundry and/or from Nancy's presence at his home construction sites, resulting in damages to Nancy. Plaintiff claims he is entitled to damages for loss of consortium as a result of Nancy's asbestos-related death.

As a point of reference, AC&S is an insulation company that installed and, to a lesser extent, supplied insulation materials. Plaintiff's theory of liability against AC&S sounds in negligent failure to warn.

Based on the material facts before the Court, as to which AC&S contends no genuine issue exists, Plaintiff's allegations against AC&S fail for the following reasons:

- (1) There is no record evidence that Plaintiff's decedent, Nancy Costeloe, was exposed to products distributed or installed by AC&S. Even if she was somehow exposed, Plaintiff cannot show it was with sufficient frequency and regularity necessary to hold AC&S liable.
- (2) In the first alternative, there is no record evidence that AC&S was negligent. In other words, Plaintiff cannot show that AC&S knew or should have known about the dangers of asbestos.
- (3) In the second alternative, AC&S is entitled to partial summary judgment for its role in installing insulation at the DuPont-Chattanooga facility. AC&S's installation of insulation at DuPont-Chattanooga constituted an improvement to realty under the Blackacre statute of repose as to which no reasonable jury could disagree.

II. STATEMENT OF MATERIAL FACTS

AC&S submits the following concise written statement of material facts, as to which it contends no genuine issue exists, in support of its entitlement to judgment as a matter of law. *See* Bl. R. Civ. P. 56.

A. Deposition of Nancy W. Costeloe

The discovery deposition of Plaintiff's decedent, Nancy W. Costeloe, was taken on July 17, 2001 in Chattanooga, Blackacre. Nancy was born in February of 1954 in Chattanooga, Blackacre, where she lived with her family until graduating from high school in 1972. (Deposition of Nancy Costeloe, July 17, 2001, p. 10/7-12). Her father, Bill Webbe, worked at the DuPont plant in Chattanooga, starting sometime in the 1940's and retiring in the 1980's. (*Id.* at p. 8/1-5). Her father also started building homes in the summer of 1966 when Nancy was entering seventh grade. (*Id.* at pp. 9/27-10/5, 10/14-17). He built three homes for the family during the time period between 1966 and 1971. (*Id.* at p. 11/7-12).

Nancy was carefully cross-examined about her possible exposure to asbestos. Her household chores growing up included doing laundry. (*Id.* at p. 12/22-24). She became primarily responsible for the household laundry around 1966 when she was in seventh grade. (*Id.* at pp. 12/26-27, 14/2). This laundry included her father's work clothes, which she says were often covered with a white or creamy dust; she typically had to shake the dust off the clothes before putting them in the wash. (*Id.* at p. 13/1-10). In addition, Nancy would sometimes pick her father up from work at DuPont with her family, though she never visited her father while at work. (*Id.* at p. 9/13-15, 9/5-6). She did, however, spend time at the three family home construction sites. (*Id.* at p. 12/3-6). This testimony highlights Nancy's only possible sources of asbestos exposure in the record. Nancy was unable to identify any asbestos-containing products that her father may have worked around.

B. Deposition of Plaintiff David Costeloe

The deposition of David Costeloe was taken on October 14, 2001 in Chattanooga, Blackacre. This testimony is not relevant to the issues before the Court at summary judgment.

C. Deposition of William Earl Webbe, Jr. (“Bill Webbe”)

The deposition of Bill Webbe was taken on January 18, 1998 in Chattanooga, Blackacre in his own asbestos-related lawsuit. For the relevant time period in this litigation, Mr. Webbe worked as an insulator at DuPont-Chattanooga from 1954-1957 and as an insulation supervisor at DuPont-Chattanooga from 1958-1972. (Deposition of Bill Webbe, January 18, 1998, p. 11/4-17). DuPont’s internal insulators were only responsible for small repair and insulation jobs, while outside insulation contractors performed major construction jobs; DuPont’s internal insulators did not work with the outside insulation contractors. (*Id.* at pp. 11/26-12/2). Mr. Webbe never installed insulation materials as an insulation supervisor, though he might have been near people that did. (*Id.* at p. 11/20-24).

DuPont-Chattanooga hired AC&S for an insulation contracting job sometime in the early or mid-1960’s. (*Id.* at p. 12/4-8). Mr. Webbe remembers seeing AC&S’s workers come to work, but he didn’t work with them; on a few occasions, though, he checked out what they were doing. (*Id.* at p. 12/14-18). After AC&S finished their work, the DuPont insulators had to go in to clean it up and remove a lot of it. (*Id.* at p. 12/19-22). Notably, Mr. Webbe only saw AC&S’s workers installing foam glass and rubber installation—neither of which contain asbestos. (*Id.* at p. 12/24-29). He saw boxes of Johns-Manville Thermobestos insulation in AC&S’s storeroom, but he doesn’t know if Thermobestos was used.¹ (*Id.* at p. 12/29-31). Mr. Webbe says AC&S was replaced by another insulation contracting company after this job. (*Id.* at p. 12/9-12).

A lot of the insulation material DuPont-Chattanooga used didn’t have asbestos in it, including foam glass, Fiberglass, cork, rubber, and mineral wool. (*Id.* at p. 15/9-14). Importantly,

¹ Plaintiff may argue that there is a genuine issue of material fact as to whether Thermobestos was used because Bill goes on to say that Thermobestos must have been used if boxes were present. (*Id.* at p. 12/29-13/1). However, this latter testimony is speculation that would be inadmissible at trial and should not be considered at summary judgment because Bill lacks personal knowledge by his own admission. *See* Bl. R. Evid. 602.

AC&S was also in the business of supplying and installing these non-asbestos containing insulation products.

D. Deposition of Pete Smith

The deposition of Pete Smith was taken on March 17, 2002 in Lexington, Blackacre. Mr. Smith installed insulation as an insulator's helper at DuPont-Chattanooga from 1965-1970. (Deposition of Pete Smith, March 17, 2002, pp. 7/21-8/11). Mr. Smith described Mr. Webbe as a walking boss in his role as insulation supervisor, in that he would walk around and make sure the insulators were doing their job. (*Id.* at pp. 8/21-9/11).

Mr. Smith was carefully cross-examined about DuPont-Chattanooga's contractors and suppliers of insulation products. Mr. Smith could not speak to DuPont-Chattanooga's suppliers of insulation, but he saw AC&S's boxes present even when AC&S wasn't doing installation work; however, he never saw the materials inside AC&S's boxes nor whether the materials in the boxes were installed. (*Id.* at pp. 41/17-42/4). He also saw boxes of Kaylo, Johns-Manville Thermobestos, and Pittsburgh-Corning Unibestos, the insulation products usually used by DuPont-Chattanooga, but he doesn't know who supplied those. (*Id.* at pp. 42/5-14, 33/18-23). He doesn't know if AC&S supplied non-asbestos containing insulation to DuPont-Chattanooga. (*Id.* at pp. 42/22-43/4).

Mr. Smith recalls that AC&S was contracted for installing insulation at DuPont-Chattanooga on one occasion, sometime between 1965 and 1970. (*Id.* at pp. 38/8-13, 121/2-8). He saw them hanging insulation, and the job went on for less than a year. (*Id.* at pp. 37/17-24, 87/20-22). The contracting job was for an addition to the facility on another side of the plant from where Mr. Smith generally worked. (*Id.* at pp. 37/17-38/2, 87/1-5). He saw Mr. Webbe overseeing AC&S's work on this addition to the facility.² (*Id.* at p. 87/7-12). He says Mr. Webbe would go

² AC&S timely objected to the form of this question because it lacked proper foundation. The immediately preceding testimony indicates that Mr. Smith worked on a different side of the facility from AC&S's workers.

over there every day to check on their work.³ (*Id.* at pp. 87/14-19). On one occasion, three to six months after its original installation, Mr. Smith and the other insulators had to remove and replace part of the insulation that AC&S installed. (*Id.* at pp. 122/10-15, 124/23-125/8). The products they had to remove were the same types of insulation products normally used by DuPont, but there was more Unibestos present than where Mr. Smith usually worked. (*Id.* at pp. 127/22-128/12).

Mr. Smith was carefully cross-examined about his role in the home construction sites. Mr. Smith hung sheetrock and drywall at two houses that Mr. Webbe was building, one in 1967 and one in 1969. (*Id.* at pp. 12/15-24, 20/8-19). Mr. Smith never saw any of AC&S's workers at the home construction sites, and he never saw AC&S's boxes. (*Id.* at p. 43/10-17). The joint compound, sheetrock, and shingles are the only products at the home construction sites that he knew contained asbestos. (*Id.* at pp. 43/18-44/5). Notably, AC&S was not in the business of supplying or installing any of these products.

Mr. Smith was carefully cross-examined about whether he knew about the dangers of asbestos. DuPont-Chattanooga never provided any safety instructions for using asbestos products other than general safety warnings. (*Id.* at pp. 10/24-11/9). He also never saw any warning signs relating to the dangers of asbestos. (*Id.* at p. 72/9-12). Mr. Webbe never informed Mr. Smith about the inherent risks of asbestos. (*Id.* at p. 12/10-14). There were, however, rumors in the parking lot, where co-workers were talking about asbestos possibly being bad for them; nevertheless, Mr. Smith called this "pure speculation." (*Id.* at p. 139/12-23).

Without testimony that Mr. Smith had the capacity to see AC&S's workers from the other side of the factory, this testimony is insufficient to show that Mr. Smith had personal knowledge as required under Bl. R. Evid. 602, and, therefore, it should not be considered.

³ AC&S urges the Court to apply the same form objection to this testimony because it is a follow up question to the original question that was timely objected to, and, likewise, lacks the requisite foundation. *See* Bl. R. Evid. 602.